(10)

No. 93-1199-CFX
Status: GRANTED

Title: Marvin Stone, Petitioner
v.
Immigration and Naturalization Service

Docketed:
January 26, 1994

Court: United States Court of Appeals for the Sixth Circuit

Counsel for petitioner: Stone,Marvin, Funke,David E., Morrison,Alan B.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Jan 26 1994	G	Petition for writ of certiorari filed.
3	Feb 25 1994		Order extending time to file response to petition until March 28, 1994.
4	Mar 25 1994		Order further extending time to file response to petition until April 27, 1994.
5	Apr 28 1994		Brief of respondent United States filed.
6	May 4 1994		DISTRIBUTED. May 20, 1994 (Page 1)
7	May 23 1994		Petition GRANTED.
			**********
8	Jul 21 1994	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
9	Jul 28 1994		Brief of petitioner Marvin Stone filed.
13	Aug 29 1994		Record filed.
		*	Certified record proceedings U.S. Court of Appeals for the Sixth Circuit and Board of Immigration Appeals.
11	Aug 30 1994		Order extending time to file brief of respondent on the merits until September 13, 1994.
12	Sep 13 1994		Brief of respondent Immigration & Naturalization Service filed.
14	Sep 26 1994		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
15	Sep 30 1994		CIRCULATED.
16	Oct 7 1994		SET FOR ARGUMENT MONDAY, NOVEMBER 28, 1994. (2ND CASE.)
17	Oct 17 1994	X	Reply brief of petitioner filed.
18	Nov 28 1994		ARGUED.

NO. 931199 JAN 26 1994

In The

SUPREME COURT OF THE UNITED STATES

October Term 1993

MARVIN STONE

Petitioner

-vs-

IMMIGRATION AND
NATURALIZATION SERVICE Respondent

Petition for Writ of Certiorari

to the

UNITED STATES COURT OF APPEALS

for the

SIXTH CIRCUIT, CINCINNATI OHIO

MARVIN STONE pro se

184 N MILL ST 2nd fl

Lexington KY 40507

48 pp

QUESTION PRESENTED

Whether the SIXTH CIRCUIT erred in its decision in not accepting jurisdiction of the Petition for Review submitted by Petitioner, and filed within 90 days after the return of a decision on a motion before the BOARD OF IMMIGRATION APPEALS (BIA)-and whether the filing of a motion for reconsideration or to reopen within the 90 day period, stops the §106(a)(1) 'clock' (see IMMIGRATION ACT, 8 USC §1105a(a)(1)) from running.

This Petition presents an issue resolved by implication by the SIXTH CIRCUIT, but not specifically & unequivocally decided by this Honorable COURT. And, the opinion below conflicts by implication with previous decisions of this Honorable COURT, and with decisions of the NINTH & ELEVENTH CIRCUITS.

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STATUTES INVOLVED OR
SECTIONS INVOLVED

8 USC §1105 a(a)(1) See IMMIGRATION ACT

§ 106 (a)(1)

NO.

In The

SUPREME COURT OF THE UNITED STATES

October Term 1993

MARVIN STONE

Petitioner

-vs-

IMMIGRATION &
NATURALIZATION SERVICE

Respondent

Petition for Writ of Certiorari
to the
UNITED STATES COURT OF APPEALS
for the SIXTH CIRCUIT CINCINNATI

Petitioner Marvin Stone, a Canadian national, respectfully prays that a Writ of Certiorari issue to review the judgment & opinion of the UNITED STATES COURT OF APPEALS for the SIXTH CIRCUIT refusing to accept jurisdiction of his Petition for review filed in a timely manner, within 90 days from the last decision of the Board of

Immigration Appeals (BIA). Said opinion & decision of the SIXTH CIRCUIT presents an issue not specifically & unequivocally decided by this Honorable COURT, and said decision by the SIXTH CIRCUIT, while similar to decisions in the THIRD & SEVENTH CIRCUITS, conflicts with previous decisions of this Honorable COURT, and with decisions of the NINTH CIRCUIT & ELEVENTH CIRCUIT.

OPINIONS BELOW

The decision of the Court of Appeals for the SIXTH CIRCUIT is reproduced currently as 93-3163 (6th CIRCUIT 1993) and unpublished as yet, and appears in APPENDIX A to this Petition. The 2 decisions of the BOARD of IMMIGRATION APPEALS (BIA) appear in APPENDIX B.

JURISDICTION

The SIXTH CIRCUIT's decision in not accepting jurisdiction of Petitioner's Petition for Review was decided & filed on January 6th,

1994, and is set forth in APPENDIX A; And Petitioner invokes this Honorable COURT's jurisdiction within the 90 day period after a decision of the SIXTH CIRCUIT COURT OF APPEALS.

STATUTORY PROVISIONS INVOLVED

Under §106(a)(1) of the IMMIGRATION & NATURALIZATION ACT 8 USC §1105a(a)(1) a Petition for Review must be filed within 90 days after the date of a final order. The question to be answered by this Honorable COURT is whether the filing of a motion to reconsider or reopen within the 90 day period stops the §106a(1) clock from running. Petitioner filed the Petition for Review for which the SIXTH CIRCUIT would not accept jurisdiction promptly within 90 days after receipt of the last motion received from the BIA. As an improbable aside to the foregoing question, is that Petitioner, who was proceeding pro se, sought advice from both the SIXTH CIRCUIT's CLERKS

office, and the office of THE IMMIGRATION JUDGE which has tenure of Petitioner's case, and both of the foregoing institutions, on 2 occasions, advised petitioner to await until the return of the last motion to the BIA, before proceeding & filing a Petition for Review at the SIXTH CIRCUIT. Petitioner was never ever late on any court matter-on the advice given Petitioner by the aforesaid institutions.

STATEMENT OF THE CASE

Petitioner is a 59 year old native & citizen of CANADA who entered the UNITED STATES from CALGARY ALBERTA to CHICAGO in about 1978 legally, as a businessman without any time limitation. Petitioner had entered the country many times before, but each time legally, and as a businessman. Petitioner was convicted in 1982 in the EASTERN DISTRICT of KENTUCKY of conspiracy & mail fraud charges pursuant to 18 USC§ 371 & 1341. The convictions

& indictments were in 1982, but the offences actually occurred in 1977; Petitioner was sentenced to 3 years in prison, and was actually incarcerated for about 18 months at FCI LEXINGTON.

An 'order to show cause' was issued by the INS on March 18th 1987, and erroneously charged Petitioner with deportability pursuant to Section 241 (A)(2) of the Act, as a non-immigrant visitor, who entered the country for pleasure, and with an overstay. The Immigration Judge (IJ) found Petitioner deportable, and also found Petitioner barred by Statute from establishing good moral character, under Section 101 F of the Act.

Petitioner appealed to the BIA and argued that the 'order to show cause' was in error & legally defective; That the 'service regulations' as utilized by the Immigration officials-do not conform with the Statute, and are therefore unconstitutional; And that Section 101F(7) of the Act should not act as a

'bar' where offences occurred more than 10 years before incarceration; The BIA dismissed the above appeal & issued a final order of deportation; Petitioner promptly filed a motion to reconsider with the BIA, and after consulting with the CLERKS OFFICE at the SIXTH CIRCUIT,and the OFFICE OF THE IMMIGRATION JUDGE at CHICAGO, Petitioner was unequivocally told by both bodies, to await until the return of the BIA's decision, on the lastly filed motion, before instituting any Petition for Review with the SIXTH CIRCUIT, so as to prevent a multiplicity of appeals.

When the last motion before the BIA was returned on the 3rd of February, 1993, Petitioner promptly filed the instant Petition for Review at the SIXTH CIRCUIT enunciating the aforesaid 3 grounds as submitted to the BIA in said Petition for Review. This Petition for Review was filed on the 25th of March 1993, within the appropriate time li-

mit for filing such Petitions;

The decision of the SIXTH CIRCUIT dismissing the Petition for Review for want of jurisdiction is set out in the APPENDIX hereto, and is at odds with the decisions of the NINTH & ELEVENTH CIRCUITS, and conflicts with a previous decision of this Honorable COURT.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for 3 reasons: Firstly, this Petition presents an issue resolved by implication by the SIXTH CIRCUIT, but not specifically & unequivocally decided by this Honorable COURT; Secondly, the SIXTH CIRCUIT opinion conflicts by implication with a previous decision of this Honorable COURT, and although the SIXTH CIRCUIT's opinion tends to agree with certain decisions of the THIRD & SEVENTH CIRCUITS, its opinion clearly conflicts with the decisions of the NINTH & ELEVENTH CIRCUITS; And thirdly, the SIXTH CIRCUIT's CLERKS OFFICE as well as the

the OFFICE of the IMMIGRATION JUDGE, must bear some responsibility in giving improper information & proceedures which sabotage 'pro se' filers of petitions as has happened herein. See reply brief of Petitioner-as 93-3163; Petitioner for his part, is not guilty of any dilatory practices, and has been timely in all court filings to date, often making filings far ahead of required time schedules.

Were petitioner resident within the NINTH CIRCUIT's domain, there is no doubt that the NINTH CIRCUIT would have entertained jurisdiction of the said Petition for Review. The NINTH CIRCUIT in BREGMAN, 351 F2d, 401 has reasoned that the SUPREME COURT had interpreted the reference in §1105a(a) to "all final orders of deportation" as including denials of motions to reopen. It followed from this in the NINTH CIRCUIT's view "that if the motion to reopen before the BIA is within 6 months of the final order of deportation & the petition to this Court is within 6 months of the denial

of the motion...this Court has jurisdiction to review both the final order of deportation & the denial of the motion to reopen." Id at 402. In other words, as the NINTH CIRCUIT suggested in a subsequent opinion, "Congress visualized a single administrative proceeding in which all questions relating to an alien's deportation would be raised & resolved, followed by a single Petition in a Court of Appeals for judicial review..." YAMADA vs INS, 384 F2d 214, 218 (9th CIRCUIT 1967). Support for this view-which is consistent with the argument that the SOLICITOR GENERAL presented to the SUPREME COURT in GIOVA (citation following) -- was said to be found in concern expressed by a congressional committee over the fact that"(s)uccessive piecemeal appeals had been used as a dilatory tactic to postpone the execution of deportation orders".

The THIRD CIRCUIT decisions, and the decision of the SEVENTH CIRCUIT (AKRAP v INS 966 F2d 267) are in direct conflict with the

NINTH CIRCUIT's view, and the view of the ELEVENTH CIRCUIT in FLEARY. See FLEARY v INS 950 F2d at 713, which seems to hold that an administrative order of deportation is not final where a motion to reopen is pending at the BIA.

The NINTH CIRCUIT's rationale reflects that Court's understanding of the logic implicit in GIOVA v ROSENBERG 378 US 18 (1964) wherein the SUPREME COURT, in a one-sentence per curiam opinion reversed a NINTH CIRCUIT decision reported at 308 F2d 347 (1962),and the SUPREME COURT then reversed the dismissal of the matter by the NINTH CIRCUIT for want of jurisdiction & remanded the case back to the NINTH CIRCUIT with directions to entertain the Petition for Review.

Added to all of this, Petitioner asked the SIXTH CIRCUIT's CLERKS OFFICE, & the office of THE IMMIGRATION JUDGE (twice) for the correct proceedures to be followed for a Petitioner who is filing 'pro se', & was

given wrongful information by both institutions, who must bear some responsibility in not sabotaging 'pro se filers'. The foregoing institutions are routinely giving out misinformation that Petitioners must await the return of all motions before the BIA, prior to commencing a Petition for Review at the courts of appeal.

This Honorable COURT then, should take this opportunity to clarify its holdings in the GIOVA case, and the various rulings in the appellate circuits, including the SIXTH CIRCUIT herein, which are in conflict to this very date, and to protect & educate 'pro se' filers of Petitions.

CONCLUSION

For the reasons set forth above, a WRIT of CERTIORARI should issue to review the judgment & opinion of the COURT OF APPEAL in this matter.

If this COURT elects not to address the

issues presented in this writ at the present time, it is requested that the writ issue & that the matter be remanded to the SIXTH CIRCUIT for redetermination in light of this COURT's opinion in the GIOVA case. Supra.

Dated at LEXINGTON KY
this 17th of January, 1994.

Respectfully
Submitted:

State of Kentucky)
County of Fayette)

D. Lawrence Sherman
NOTARY PUBLIC
My commission expires
20 March 1995

MARVIN STONE pro se
184 N MILL ST 2nd Fl
LEXINGTON KY 40507

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing petition for a writ of certiorari of the Petitioner MARVIN STONE, has this 17th day of January, 1994, been made upon the SOLICITOR GENERAL, by mailing 3 true copies in the UNITED STATES mail, postage prepaid, addressed to:

SOLICITOR GENERAL
DEPT OF JUSTICE
WASHINGTON DC 20530

M STONE pro se

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1994 FED App. P (6th Cir.)
File Name: 94A0001P.06

No. 93-3163

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARVIN STONE,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

ON PETITION for Review of an Order of the Board of Immigration Appeals

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Decided and Filed January 6, 1994

Before: NELSON and BATCHELDER, Circuit Judges; and MATIA, District Judge.*

DAVID A. NELSON, Circuit Judge. Marvin Stone, the petitioner in this matter, seeks review of a deportation order that became final more than a year and a half before the petition for review was filed in this court. Under § 106(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1105a(a)(1), a petition for review must be filed

*The Honorable Paul R. Matia, United States District Judge for the Northern District of Ohio, sitting by designation.

within 90 days after the date of the final order. The threshold question that we must answer is whether the filing of a motion for reconsideration within the 90-day period stopped the § 106(a)(1) clock from running.

Mr. Stone's deportation order became final in July of 1991. Stone promptly filed a motion asking the Board of Immigration Appeals to reconsider the order, but he did not file a petition for review in this court until March of 1993, after the motion for reconsideration had been denied. We believe that a 1990 amendment to the Immigration and Nationality Act compels the conclusion that a motion to reconsider does not toll the time for seeking judicial review. Mr. Stone's petition was thus untimely insofar as it dealt with the 1991 order.

While we have no jurisdiction to review the underlying deportation order, we do have jurisdiction to determine whether the Board abused its discretion in denying the petitioner's motion to reconsider the order. Finding no abuse of discretion, we shall deny relief.

I

Petitioner Stone, a businessman and sometime lawyer, is a life-long citizen of Canada. A frequent visitor to the United States prior to 1977,[1] he says that he has resided here continuously since that time -- "but not with legal immigration documentation," as he puts it.

On January 3, 1983, Mr. Stone was convicted in a United States District Court on mail fraud charges. His conviction was affirmed on appeal, and he served approximately 18 months of a three-year sentence at a federal correctional institution.

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[1]The Immigration and Naturalization Service apparently sought to exclude Mr. Stone from this country in 1975 because of criminal fraud charges pending against him in Canada. We gather that an immigration hearing officer held that Mr. Stone could not be barred from entering the United States as a visitor.

The Immigration and Naturalization Service instituted deportation proceedings against Mr. Stone subsequent to his release from prison. In January of 1988, at the conclusion of a series of hearings before an immigration judge, a deportation order was issued against Mr. Stone on the ground that he had remained in the United States for a longer time than permitted. (Under 8 C.F.R. § 214.2(b), as in effect in 1977, the initial stay in this country of a nonimmigrant business visitor was not supposed to exceed six months; the regulations authorized the granting of extensions in six-month increments, but Mr. Stone testified that he was unaware of the need to apply for an extension. Mr. Stone has remained in the United States for some years now without written authorization.)

The immigration judge also denied an application for suspension of deportation pursuant to § 244(a) of the Immigration and Nationality Act, 8 U.S.C. § 1254(a), which grants authority to suspend deportation of an alien who has been physically present in the United States for at least seven years, who has been of good moral character during that time, and whose deportation would work extreme hardship on him or his family. Because Mr. Stone had been confined to a penal institution for more than 180 days within the seven-year period, the immigration judge concluded, a finding of good moral character was foreclosed by 8 U.S.C. § 1101(f)(7). That section provides, in pertinent part, that "[n]o person shall be regarded as, or found to be, a person of good moral character who . . . has been confined, as a result of a conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense, or offenses, for which he has been convicted were committed within or without such [seven-year] period."

Mr. Stone appealed the immigration judge's order to the Board of Immigration Appeals. In a decision dated July 26, 1991, the Board dismissed the appeal. The order of deportation became final on that date under 8 C.F.R.

§ 243.1, which provides that "an order of deportation . . . shall become final upon dismissal of an appeal by the Board . . . ."

In August of 1991, proceeding *pro se*,[2] Mr. Stone filed with the Board a pleading styled "Motion to Reopen and/or to Reconsider its Decision; Appeal to the Board of Immigration Appeals." The motion did not set forth any "new facts to be proved at [a] reopened hearing," as would have been required for a motion to reopen, and the Board treated the document as solely a motion to reconsider. Neither type of motion could have served to stay the deportation order. See 8 C.F.R. § 3.8, which so provides.

In a short decision dated February 3, 1993, the Board denied the reconsideration motion as frivolous. Mr. Stone filed his petition for review in this court on March 25, 1993.

II

With the enactment in 1961 of the Immigration and Nationality Act, Pub. L. 87-301, 75 Stat. 650, Congress effected a major overhaul of this country's immigration laws. One of the objects of the 1961 legislation was to streamline judicial review of deportation orders. In a section codified at 8 U.S.C. § 1105a, the Act denied the district courts any role in the review process; subject to stated modifications, the procedure for direct review by the courts of appeals (a procedure prescribed by what is now Chapter 158 of Title 28) was made "the sole and exclusive procedure" for obtaining judicial review of final orders of deportation. 8 U.S.C. § 1105a(a). The "fundamental purpose" of § 1105a was "to abbreviate the process of judicial review . . . in order to frustrate certain practices . . . whereby persons subject to deportation were

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[2]Mr. Stone was represented by counsel at the outset of the hearings before the immigration judge, but the attorney did not appear at the final hearing; Mr. Stone has represented himself ever since.

forestalling departure by dilatory tactics in the courts." *Foti v. I.N.S.*, 375 U.S. 217, 224 (1963).

Under § 1105a(a)(1), as originally enacted, persons against whom deportation orders were issued were given up to six months within which to seek appellate court review. In the Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978, however, that period was reduced to 90 days for aliens who had not been convicted of aggravated felonies. In the case of an alien convicted of an aggravated felony, the filing period was cut to 30 days. 8 U.S.C. § 1105a(a)(1), as amended by Pub. L. 101-649, § 502(a).

Prior to 1990 a split of authority had developed among the circuits as to whether the filing of a motion to reopen or reconsider a final order of deportation operated to extend the time for seeking judicial review. In an opinion issued in 1986, *Nocon v. I.N.S.*, 789 F.2d 1028, 1033 (3rd Cir. 1986), the Court of Appeals for the Third Circuit rejected the contention that the filing of a motion to reopen or reconsider a final deportation order suspends the statutory time limit on seeking judicial review. "[T]o hold otherwise," the court said, "would defeat the purpose of [a] statute [that] . . . was designed to prevent undue delay in deportation once the alien's immigration status had been decided." *Id.* (internal quotations and citation omitted).[3] The court acknowledged that its approach was at odds with the approach of other courts of appeals, *id.* at 1031, citing *Bregman v. I.N.S.*, 351 F.2d 401 (9th Cir. 1965), and *Hyun Joon Chung v. I.N.S.*, 720 F.2d 1471

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[3]The conclusion that a motion to reopen or reconsider does not preclude the filing of a petition to review the final deportation order is supported, as the Third Circuit noted, by the fact that the regulation governing such motions "appears to assume the continuing appealability of the original deportation order . . . ." *Nocon*, 799 F.2d at 1033 n.5, citing 8 C.F.R. § 3.8(a) ("Motions to reopen or reconsider shall state whether the validity of the deportation order has been or is the subject of any judicial proceeding and, if so, the nature and date thereof, the court in which such proceeding took place or is pending, and its result or status").

(9th Cir.), *cert. denied*, 467 U.S. 1216 (1984),[4] but the Third Circuit declined to accept the rationale of those cases.

The Ninth Circuit's rationale reflects that court's understanding of the logic implicit in *Giova v. Rosenberg*, 379 U.S. 18 (1964), a one-sentence per curiam opinion in which the Supreme Court reversed a Ninth Circuit decision reported at 308 F.2d 347 (1962). A deportation order against Mr. Giova had become final on September 15, 1957. Mr. Giova moved to reopen the proceedings before the Board of Immigration Appeals, and his motion was denied on November 3, 1961. He then sought judicial review of the denial of the motion to reopen, but did not appeal from the underlying order of deportation. The Court of Appeals dismissed the matter for want of jurisdiction, but the Supreme Court reversed the dismissal and remanded the case with directions to entertain the petition for review.

It is clear that Mr. Giova's petition for review dealt only with the denial of his motion to reopen and not with the deportation order itself. See 308 F.2d at 348. In *Bregman*, 351 F.2d 401, however, the Ninth Circuit reasoned that the Supreme Court had interpreted the reference in § 1105a(a) to "all final orders of deportation" as including denials of motions to reopen. It followed from this, in the Ninth Circuit's view, "that if the motion to reopen before the Board is within six months of the final order of deportation and the petition to this court is within six months of the denial of the motion . . . this court has jurisdiction to review both the final order of deportation and the denial of the motion to reopen." *Id.* at 402. In other words, as the Ninth Circuit suggested in a subsequent opinion, "Congress visualized a single administrative proceeding in which all questions relating

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[4]See also *Attoh v. I.N.S.*, 606 F.2d 1273 (D.C. Cir. 1979); *Pierre v. I.N.S.*, 932 F.2d 418 (5th Cir. 1991); and *Fleary v. I.N.S.*, 950 F.2d 711 (11th Cir. 1992), all of which stem from the Ninth Circuit's decision in *Bregman*.

to an alien's deportation would be raised and resolved, followed by a single petition in a court of appeals for judicial review . . . ." *Yamada v. I.N.S.*, 384 F.2d 214, 218 (9th Cir. 1967). Support for this view -- which is consistent with the argument that the Solicitor General presented to the Supreme Court in *Giova* -- was said to be found in the concern expressed by a congressional committee over the fact that "[s]uccessive, piecemeal appeals had been used as a dilatory tactic to postpone the execution of deportation orders." *Hyun Joon Chung*, 720 F.2d at 1474 (citing H. R. No. 1086, 87th Cong., 1st Sess., reprinted in 1961 U.S. Code Cong. & Admin. News 2950, 2967).

It is true that Congress was concerned about dilatory tactics, but given the way in which the system works in practice the Ninth Circuit approach seems more conducive to dilatory tactics than does the Third Circuit approach. Under the Ninth Circuit's *Bregman* decision and its progeny, an alien against whom a final deportation order has been entered can file a reconsideration motion, meritorious or not, and simply wait for however long it takes for the authorities to commence execution of the deportation order or for the Board to decide the motion for reconsideration. Normally, when one of those events finally occurs, the alien can then obtain a stay of the deportation order by filing a petition for judicial review. (A motion to reopen or reconsider does not stay deportation, as we have seen, but the filing of a petition for review automatically stays deportation pending determination of the petition by the court unless the court directs otherwise. See 8 U.S.C. § 1105a(a)(3).) Given the measured pace at which the I.N.S. often operates, the filing of a motion for reconsideration may, under the Ninth Circuit approach, mean that the day of judgment in the court of appeals -- and actual deportation -- will not arrive until months or years later than would otherwise have been the case. (It is not without significance, in this connection, that it took the Board of Immigration Appeals more than 17 months to reject as frivolous the motion for reconsideration filed here by petitioner Stone.)

Whatever the law may have been previously, we do not believe that the Ninth Circuit approach is consistent with the statute as amended in 1990. In addition to cutting in half the time for filing a petition for review, the 1990 legislation amended 8 U.S.C. § 1105a(a) by adding the following subsection:

> "(6) Whenever a petitioner seeks review of [a final order of deportation] under this section, any review sought with respect to a motion to reopen or reconsider such an order shall be consolidated with the review of the order." Pub. L. No. 101-649, § 545(b)(3), 104 Stat. 4978, 5065 (1990).

This provision for consolidating review of the final deportation order with review of the Board's disposition of a motion to reopen or reconsider would make no sense at all unless separate petitions for review could be filed. If Congress had intended to provide for a single petition for review covering both the original deportation order and the subsequent denial of a motion for reconsideration, there would not be two review proceedings to consolidate.

Arguing against the conclusion that the Ninth Circuit approach should no longer be followed is *Fleary v. I.N.S.* (n. 4, *supra*), where the Eleventh Circuit decided -- based in part on the absence of any legislative history contrary to this conclusion -- that the 1990 legislation "follows the contours of the Ninth Circuit decisions." 950 F.2d at 713. Subsequent to *Fleary*, however, the Court of Appeals for the Seventh Circuit declared that the 1990 enactment of 8 U.S.C. § 1105a(a)(6) "has put to rest" the conflict that previously existed between cases such as *Nocon* in the Third Circuit and *Hyun Joon Chung* in the Ninth Circuit. See *Akrap v. I.N.S.*, 966 F.2d 267, 271 (7th Cir. 1992). The logic of the Seventh Circuit's *Akrap* decision strikes us as irrefutable:

> "By its own terms [§ 1105a(a)(6)] refers to the consolidation of two reviews (and not to the 'consolidation' of BIA 'orders' as *Fleary*, 950

> F.2d at 713 suggests). If the filing of a motion to reopen were to render any previous orders non-final, only one final order would exist -- and what then would be subject to 'consolidation' even in the *Fleary* view?
>
> In short, any such rule as *Fleary* prescribes would also be incompatible with the plain language of [§ 1105a(a)(6)]. We hold that BIA's . . . deportation order was a final order when issued, and it remained a final order notwithstanding Akrap's motion to reopen." *Id.*

Applying the logic of *Nocon* and *Akrap* here, we conclude that the deportation order of July 26, 1991, was a final order when issued. The order remained a final order notwithstanding Mr. Stone's subsequent filing of a motion for reconsideration -- and the petition for judicial review filed in 1993 came too late to give us jurisdiction with respect to the 1991 deportation order.

In reaching this conclusion we are mindful of the Supreme Court's admonition in *Cheng Fan Kwok v. I.N.S.*, 392 U.S. 206, 212 (1968):

> "Section 106(a) [8 U.S.C. § 1105a(a)] is intended exclusively to prescribe and regulate a portion of the jurisdiction of the federal courts. As a jurisdictional statute, it must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes."

III

Contending that government employees gave him erroneous advice on the procedure to be followed in obtaining review of the deportation order, Mr. Stone suggests that we should find the I.N.S. estopped to raise the jurisdictional issue. The suggestion is not well taken.

In general, equitable estoppel may be invoked against the government in deportation proceedings only where the government has been guilty of "affirmative misconduct." *Bolourchian v. I.N.S.*, 751 F.2d 979, 980 (9th Cir. 1984). No affirmative misconduct is alleged in the instant case; the most that can be said is that Mr. Stone (who was trained as a lawyer himself) may have been given imperfect legal advice on an area of the law that can fairly be said to have been unsettled.

Even if the government were precluded from raising the jurisdictional issue, moreover, we would have an obligation to do so ourselves -- and except as specifically authorized by law, we are prohibited by Rule 26(b), Fed. R. App. P., from enlarging the time prescribed by law for filing a petition for review. Nothing in the law authorizes us to enlarge the 90-day period established in 8 U.S.C. § 1105a(a)(1).

IV

Although the 1990 amendment is inconsistent with the conclusion previously reached by the Ninth Circuit in *Bregman* and its offspring, § 1105a(a)(6) does reflect a congressional understanding that petitions for review may be filed with respect to rulings on motions to reopen or reconsider. The narrow holding of *Giova v. Rosenberg*, 379 U.S. 18, thus survived the 1990 legislation, even though *Giova*'s broader implications did not; we clearly have jurisdiction, as the I.N.S. acknowledges, to review the order in which the Board denied Mr. Stone's motion to reconsider. (The petition for review was filed, as the reader may remember, within 90 days after the date on which the motion was denied. Not counting the time during which the motion for reconsideration was pending, moreover, the time that elapsed between the issuance of the 1991 deportation order and the 1993 denial of the motion for reconsideration did not exceed 90 days.)

Our standard of review is one of abuse of discretion -- see *Dawood-Haio v. I.N.S.*, 800 F.2d 90, 95 (6th Cir.

1986) -- and we are satisfied that the Board did not abuse its discretion in denying Mr. Stone's motion for reconsideration. The caselaw cited in the motion did not support the conclusion that Mr. Stone should be permitted to remain in the United States, and we fully agree with the Board's characterization of the motion as "frivolous."

Insofar as the petition for review applies to the final order of deportation, the petition is **DISMISSED FOR WANT OF JURISDICTION**; insofar as it applies to the denial of the motion for reconsideration, the petition is **DENIED**.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church Virginia
22401

Decision of the
Board of Immigration
Appeals

File A 21 029 325 - Cincinnati

In re: MARVIN STONE Jul 26 1991

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF SERVICE: William A Cassidy
General Attorney

CHARGE:

Order: Sec 241(a)(2), I & N Act
[8 U.S.C. § 1251(a)(2)]
Nonimmigrant -remained longer
than permitted

APPLICATION: Suspension of Deportation

The decision of the immigration judge dated January 29, 1988, which found the respondent deportable as charged and denied his applications for suspension of deportation pursuant to section 244(a) of the Immigration and Nationality Act, 8 U.S.C. § 1254(a)m, and for voluntary departure pursuant to section 244(e) of the Act, is affirmed. The respondent's appeal is dismissed.

The respondent is a 58-year-old native and citizen of Canada who entered the United States in 1978 as a nonimmigrant visitor. [1]He was convicted in 1982 in the Eastern District of

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[1]The Service asserted in the Order to Show Cause that the respondent entered the United States as a nonimmigrant visitor for pleasure. The respondent asserted as his deportation hearing, however, that he entered the United States in 1977 as a nonimmigrant visitor for business.

Kentucky of conspiracy to commit mail fraud and mail fraud pursuant to 18 U.S.C. § 371 and 1341. He was sentenced to 3 years in prison on one count and 5 years suspended plus 5 years probation on counts 2, 3 and 4. He was actually incarcerated for approximately 18 months. On November 27, 1984, the United States Court of Appeals for the Sixth Circuit affirmed the respondent's conviction. An Order to Show Cause was issued on March 18, 1987, charging the respondent with deportability pursuant to section 241(a)(2) of the Act, 8 U.S.C. §1251(a)(2), as a nonimmigrant who remained longer than permitted. At his deportation hearing on August 24, 1987, the respondent admitted that he is a native and citizen of Canada but denied that he was a nonimmigrant who remained longer than permitted and denied his

deportability. The immigration judge found him deportable based on his admission that he was an alien who entered the United States temporarily for business in 1977, and based on his testimony that he has not become a lawful permanent resident of the Untied States since that time, nor has he requested an extension of time to remain in the United States. The respondent then applied for and was denied suspension of deportation pursuant to section 244(a) of the Act. The immigration judge denied him that relief based on his finding that the respondent was precluded from establishing good moral character by section 101(f) of the Act, 8 U.S.C. § 1101(f).

On appeal, the respondent contends that the immigration judge erred in

denying him a continuance pending an appeal to the Supreme Court in a case similar to his; that he was incorrectly found to be not of good moral character because he lacked a fraudulent intent; that the Service regulations relating to the time limits allowed nonimmigrant visitors to the United States are unconstitutional as violative of due process because the statutes themselves mention no time limits; and that the Service did not establish deportability because it produced no proof that he entered the United States as a visitor.

We first consider the respondent's assertion that the Service did not establish deportability. In order to establish an alien's deportability as an overstay, the Service need only show that the alien was admitted as a nonimmigrant

for a temporary period; that the period has elapsed; and that the alien has not departed. See Equan v. United States INS, 844 F.2d 276,278 (5th Cir. 1988); Kahlenberge v. INS, 763 F.2d 1346, 1352 (11th Cir. 1985), cert. denied, 475 U.S. 1120 (1986); Che-Lei Shen v. INS, 749 F.2d 1469,1472 (10th Cir. 1984); Ho Chong Tsao v. INS, 538 F.2d 667, 678 (5th Cir. 1976), cert. denied, 430 U.S. 906 (1977); Milande v. INS, 484 F.2d 774, 776 (7th Cir. 1973); Matter of Santos, 19 I&N Dec. 105 (BIA 1984); Matter of Teberen, 15 I&N Dec. 689 (BIA 1976). Once alienage has been admitted, however, the burden shifts to the alien to show place, time, and manner of entry, and his right to remain in the United States. Matter of Benitez, 19 I&N Dec. 173 (BIA 1984). If an alien refuses to provide information about the time, place, and manner of entry, he is

presumed to be in the United States unlawfully. Id. at 177.

At the time of the respondent's entry into this country, Service regulations provided that visitors for business could "be admitted for an initial period of not more than six months" and could be granted extensions of temporary stay "in increments of not more than six months." Visitors for pleasure could "ordinarily" be admitted for "not more than six months," but could be admitted "for a longer period not exceeding one year if the admitting immigration officer determines that emergent, compelling, or other special circumstances exist warranting such longer admission period." 8 C.F.R. § 214.2(b) (1977), (1978). The regulations did not provide in either 1977 or 1978,

that a visitor could be admitted, for business or pleasure, for an indeterminate amount of time.

In the present case, the respondent admitted alienage and admitted entry into the United States as a nonimmigrant visitor for business in 1977. He admitted that he is not a lawful permanent resident and that he never obtained extensions of his nonimmigrant visa. Accordingly, based on the respondent's own admissions, it has clearly been established that the respondent entered as a nonimmigrant subject to a certain period of stay, that that time period has elapsed, and that the respondent has not departed. We find that these admissions are clear, unequivocal, and convincing and prove each of the elements of the charge of

deportability. See Woodby v. INS, 385 U.S. 276 (1966).

In regard to the respondent's contention that the Service regulations are unconstitutional, this Board does not have the authority to judge the constitutionality of statutes or regulations. See 8 C.F.R. § 3.1(b). We note, however, that Service regulations have the force and effect of law. Matter of A-, 3 I&N Dec. 714 (C.O. 1949; BIA 1949, A.A.G. 1949); Matter of C-, 1 I&N Dec. 631, 634 (BIA 1943; A.G. 1944). See United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 155 (1923). Moreover, the immigration laws have been amended a number of times subsequent to the adoption of the regulations at issue here, without reference to the adoption of the long-standing Service practice of limiting the time an alien is permitted to remain in the United States without an extension. This failure to act adversely to a long-standing practice gives rise to an inference that Congress has approved the regulations regarding nonimmigrant visitor

visas. See Helvering v. Winmill, 305 U.S. 79, 83 (1938); Costanzo v. Tillinghast, 287 U.S. 341, 345 (1932).

We also reject the respondent's contention that the immigration judge erred in failing to grant him a continuance pending the outcome of someone else's appeal. The regulations provide that a continuance may be granted in the immigration judge's discretion if good cause is shown. 8 C.F.R. § 242.13 (1987). See Matter of Perez-Andrade, 19 I&N Dec. 433 (BIA 1987). A decision to deny a continuance will not be overturned on appeal unless it appears that the respondent was deprived of a full and fair hearings. Matter of Namio, 14 I&N Dec. 412 (BIA 1973). Further, a respondent is not entitled to relief as a result of a procedural error unless he can establish that he was prejudiced by the error. Matter of Santos, supra. In this case, the respondent has not demonstrated that he had good cause for a continuance or that he was prejudiced in any manner. As noted above, the respondent's own direct appeal had already been rejected by the Sixth Circuit in 1984. As the decision in his case was clearly final, no purpose could be served by granting a

continuance to await the outcome of any other appeals, and the immigration judge's decision to deny the continuance was clearly not in error.

We turn now to the merits of the respondent's application for suspension of deportation. Section 244(a) provides for the suspension of deportation, in the discretion of the Attorney General, of any alien who has been physically present in the United States for a continuous period of not less that 7 years immediately preceding the date of such application, who proves that during all of such period he was and is a person of good moral character, and who is a person whose deportation would result in extreme hardship to the alien or his United States citizen spouse, parent, or child.

Upon our review of the record, we affirm the immigration judge's conclusion that the respondent is statutorily precluded from a finding of good moral character based on the provisions of section 101(f)(7) of the Act, 8 U.S.C. § 1101 (f)(7). This section provides that no person

shall be regarded as, or found to be, a person of good moral character if that person was:

> (7) one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred eighty days or more, regardless of whether the offense, or offenses for which he has been confined were committed within or without such period.

As the respondent in this case was confined to a penal institution for 18 months, until the middle of 1987, he therefore is precluded by statute from establishing good moral character.

We further find that even if the respondent had been found to be of good moral character, he would still be statutorily ineligible for relief by virtue of the fact that he has failed to establish extreme hardship. The elements required to establish extreme hardships are dependent upon the facts and

circumstances peculiar to each case. See Matter of Chumpitazi, 16 I&N Dec. 629 (BIA 1978); Matter of Kim, 15 I&N Dec. 88 (BIA 1974); Matter of Sangster, 11 I&N Dec. 309 (BIA 1965). See also Jara-Navarrete v. INS, 813 F.2d 1340 (9th Cir. 1986), amending, 800 F.2d 1530 (9th Cir. 1987); Zavala-Bonilla v. INS, 730 F.2d 562 (9th Cir. 1984); Ramos v. INS, 695 F.2d 181 (5th Cir. 1983). Factors relevant to the issue of hardship include the respondent's age; the length of his residence in the United States; his family ties in the United States and abroad; his health.; the economic and political conditions in the country to which he may be returned; his financial status, business, or occupation; the possibility of another means of adjustment of status; his immigration history; and his position in the community. See Hernandez-Patino v. INS, 831 F.2d 750 (7th Cir. 1987); Jara-Navarrette v. INS, supra; Matter of Gibson, 16 I&N Dec. 58 (BIA 1976); Matter of Uy, 11 I&N Dec. 159 (BIA 1965). Relevant factors must be considered in the aggregate in determining whether extreme hardship exists. See Hernandez-Patino v. INS, supra; Ramirez-Duranzo v. INS,

794 F.2d 491 (9th Cir. 1986); Ravancho v. INS, 658 F.2d 169 (3d Cir. 1981).

In this case, the respondent has offered no evidence of extreme hardship. He is divorced and his children reside in Toronto, Canada. He has no close family in the United States. The economic and political climate in Canada is not such that it would be difficult to readjust to life there; indeed, he lived his entire life in Canada and did not begin to reside in the United States for any significant period of time until he was well into his forties. Therefore, even if he had been found to be a person of good moral character, we would not find him to statutorily eligible for suspension of deportation by virtue of his failure to establish extreme hardship.

We further find that, even if the respondent had been found to be statutorily eligible for suspension of deportation, we would deny such relief in the exercise of discretion. The respondent has been convicted of mail fraud and conspiracy to commit mail fraud. Furthermore, a review of the record shows that the respondent is the subject of an outstanding

warrant for his arrest on charges of theft and fraud in Canada. Accordingly, we find that the respondent does not merit suspension of deportation in the exercise of discretion.

ORDER: The appeal is dismissed.

FOR THE BOARD

U.S. Department of Justice
Executive Office for
Immigration Review

Decision of the
Board of Immig-
gration Appeals

Falls Church Virginia 22041

File A21 029 325 - Cincinnati Date Feb 3 1993

In re: MARVIN STONE

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF SERVICE: G Michael Wick
General Attorney

CHARGE:

Order: Sec 241(a)(2), I&N Act [8 U.S.C § 1251(a)(2)]
Nonimmigrant - remained longer than permitted

APPLICATION: Motion to reconsider

The respondent has made a motion that the Board reconsider its earlier decision of July 26, 1991, in which it dismissed the respondent's appeal and found him statutorily ineligible for relief from deportation pursuant to section 244(a) of the Immigration and Nationality Act, 8 U.S.C. § 1254(a). The motion to reconsider will be denied.

Motions to reconsider shall state the reasons upon which the motion is based and shall be supported by such precedent decisions as are pertinent. See 8 C.F.R. § 3.8 (1992). The moving party must be requesting reconsideration of points previously raised by one of the parties and dealt with by the Board in its decision. Matter of DeJong, 16 I&N Dec. 739 (BIA 1979).

In this case, the respondent has presented no new precedent decisions which have any bearing on our prior decision in this case nor has be submitted any legal authorities which the Board may have inadvertently overlooked. Moreover, both of the respondent's assertions in his motion to reconsider were adequately addressed by the Board in its July 26, 1991, decision.

Accordingly, we will deny the motion as frivolous. See 8 C.F.R. 3.1(d)(1-9)(iv) (1992). We note, furthermore, that the mere filing of a motion to reconsider does not allow an alien to remain in the United States or stay the execution of an outstanding deportation order. Execution of such an order must proceed unless a stay of execution is specifically granted by the Board or the Service officer

having jurisdiction over the case. See 8 C.F.R. § 3.8 (1992.)

ORDER: The appeal is dismissed.

FOR THE BOARD

No. 93-1199

In the Supreme Court of the United States

OCTOBER TERM, 1993

MARVIN STONE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

MARK C. WALTERS
LISA C. DORNELL
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the filing of a motion to reopen or reconsider a final order of deportation tolls the time for seeking judicial review of that order.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1199

MARVIN STONE, PETITIONER

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is not yet reported. The decisions of the Board of Immigration Appeals (Pet. App. B1-B15, B16-B19) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1994. The petition for a writ of certiorari was filed on January 26, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a citizen of Canada who entered the United States as a visitor in 1977 and has resided here since that time. In 1983, he was convicted of mail fraud by a federal court. After the conviction was affirmed on appeal, he served 18 months of a three-year sentence. See Pet. App. A2, B2-B3.[1]

2. Following a hearing, an immigration judge determined that petitioner was deportable from the United States as an alien who was admitted as a visitor in 1977 and remained longer than permitted. The immigration judge also denied petitioner's application for suspension of deportation under 8 U.S.C. 1254(a) (1988 & Supp. IV 1992), concluding that petitioner was statutorily ineligible for that relief because his incarceration on the mail fraud charge prevented him from satisfying the statutory requirement of good moral character. See Pet. App. A3.

3. Petitioner appealed to the Board of Immigration Appeals, which dismissed his appeal on July 26, 1991. Pet. App. B1-B15. The Board first affirmed the immigration judge's finding of deportability. It noted that applicable regulations at the time of petitioner's entry limited the admission of nonimmigrant visitors to a period of six months, unless the visitor obtained an extension. Because petitioner never obtained an extension, the Board held that he was deportable. *Id.* at B5-B9.

[1] The statement by the Board of Immigration Appeals (Pet. App. B2) that petitioner entered in 1978 appears to be erroneous. The Board later in its opinion relied on petitioner's admission that he entered in 1977. *Id.* at B4; see *id.* at A2 (statement of court of appeals that petitioner entered in 1977). The precise year of entry has no bearing on petitioner's immigration status.

The Board also affirmed the immigration judge's conclusion that petitioner was not eligible for suspension of deportation. Suspension of deportation is available only to aliens "of good moral character," 8 U.S.C. 1254(a) (1988 & Supp. IV 1992), and 8 U.S.C. 1101(f)(7) bars a finding of good moral character for an individual "confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more" during the seven years preceding his application for suspension. Because it was conceded that petitioner was confined for at least 18 months during that period, he was ineligible for suspension of deportation. Pet. App. B11-B12. In the alternative, the Board held that petitioner would not be eligible for suspension of deportation because he had "offered no evidence of extreme hardship." *Id.* at B14. Finally, the Board concluded that even if petitioner were eligible for suspension of deportation, it would deny relief in the exercise of discretion, explaining that petitioner previously had been convicted of mail fraud and that the record indicated that there were outstanding arrest warrants in Canada on charges of theft and fraud in that country. *Id.* at B14-B15.

4. Petitioner filed a motion for reconsideration, which the Board denied on February 3, 1993. Pet. App. B16-B19. The Board explained that petitioner's motion

> has presented no new precedent decisions which have any bearing on our prior decision in this case nor has [h]e submitted any legal authorities which the Board may have inadvertently overlooked. Moreover, both of [petitioner]'s assertions in his motion to reconsider were adequately addressed by the Board in its July 26, 1991, decision. Accordingly, we will deny the motion as frivolous.

Id. at B18.

5. In early 1993, petitioner filed a petition for review in the court of appeals.[2] The court of appeals dismissed the petition for review in part and denied it in part. Pet. App. A1-A11.

a. The court of appeals dismissed petitioner's challenge to the July 26, 1991, order of the Board. Pet. App. A4-A9. The court explained that 8 U.S.C. 1105a(a) (1988 & Supp. IV 1992) requires a petition for review to be filed within 90 days of the date of the Board's order, and petitioner's petition for review was filed more than 90 days after July 26, 1991. The court noted that before 1990 some courts of appeals had held that the filing of a motion to reopen or reconsider a final order of deportation would toll the time for filing a petition for review of the order. Pet. App. A5-A7. The court concluded, however, that a 1990 amendment to Section 1105a(a)[3] made that holding untenable, because the amendment contemplated separate petitions for review of the underlying order of deportation and of the order denying a motion for reopening or reconsideration. *Id.* at A8-A9. Accordingly, the court concluded that petitioner's motion for reconsideration did not toll the time for filing a petition for review challenging the Board's 1991 opinion, and it dismissed

[2] The court of appeals and the petition indicate that the petition for review was filed on March 25, 1993. See Pet. 6; Pet. App. A4. The docket sheet in the court of appeals, however, indicates that petitioner's opening brief was filed on that date, and that the petition for review actually was filed on February 16, 1993. The difference is not important, because both dates are more than 90 days after the initial decision of the Board and less than 90 days after its rejection of petitioner's motion for reconsideration.

[3] See 8 U.S.C. 1105a(a)(6) (Supp. IV 1992) (added by Section 545(b)(3) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5065).

his petition for review as untimely as to that order. *Id.* at A9.

The court of appeals also rejected petitioner's contention that the government should be estopped from relying on the jurisdictional bar because he allegedly received erroneous advice from government employees regarding the procedure for seeking judicial review. Pet. App. A9-A10. The court explained that estoppel would be available only if petitioner could prove "affirmative misconduct" by the government. In the court's view, petitioner had not established affirmative misconduct because the claim, at most, was that petitioner "(who was trained as a lawyer himself) may have been given imperfect legal advice on an area of the law that can fairly be said to have been unsettled." *Id.* at A9-A10.

b. Because petitioner's petition for review was filed within 90 days of the Board's denial of his motion for reconsideration, the court of appeals exercised jurisdiction over that portion of the petition for review. Pet. App. A10-A11. The court denied petitioner's challenge to the denial of his motion for reconsideration, however, explaining that "we fully agree with the Board's characterization of the motion as 'frivolous.'" *Id.* at A11.

ARGUMENT

Petitioner urges the Court to use this case to resolve a conflict in the circuits on the question whether the filing of a motion to reopen or reconsider tolls the time for seeking judicial review of a final order of deportation. Pet. 7-11. Although we believe the court of appeals correctly rejected petitioner's argument, petitioner is correct in asserting that the courts of appeals are in conflict on that question. Accordingly, we agree with

petitioner that plenary review by this Court is warranted.

1. Under 8 U.S.C. 1105a(a) (1988 & Supp. IV 1992), aliens who are not aggravated felons may file petitions in the court of appeals for review of "final orders of deportation" no later than 90 days after the Board's issuance of the order.[4] Because Section 1105a(a) provides that the filing of such a petition is the "sole and exclusive procedure" for securing review of such orders, and because Section 1105a(c) imposes an express requirement that the alien exhaust available administrative remedies, the courts of appeals have jurisdiction only over challenges to final orders of deportation.

As we discuss below, some courts of appeals have concluded that an order of deportation is not final if the alien has filed a motion to reopen or reconsider the order. That conclusion is consistent with the treatment of motions to reopen or reconsider in other settings. See, *e.g.*, *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270, 284-285 (1987). Under that approach, the time for filing such a petition would not commence to run until the Board disposed of the pending motion.[5]

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[4] The Act formerly permitted six months to file a petition for review, 8 U.S.C. 1105a(a) (1988), but the time period was shortened by Section 545(b)(1) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5065. The shortened time period applies to all final orders entered on or after January 1, 1991. 1990 Act § 545(g)(4), 104 Stat. 5067. That provision applies to this case because petitioner's final order of deportation was entered on July 26, 1991.

[5] Our view is not in all cases adverse to the interests of the alien. When an alien seeks prompt review of the decision of the Board, even though he has filed a motion to reopen or reconsider, our view allows the alien to do so, whereas the contrary view bars the alien from obtaining review until the Board disposes of the

In our view, that process is not conducive to orderly administration of the immigration laws, because it is likely to lead to lengthy delays between the Board's entry of final orders of deportation and review by the courts of appeals of those orders. Because a challenge to the Board's initial order is considerably more likely to raise significant issues than any challenge to the Board's denial of a motion to reopen or reconsider,[6] significant delay in the judicial review of the initial order is, as a general matter, likely to slow the overall disposition of deportation proceedings.[7] In light of the "fundamental

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motion to reopen or reconsider. See, *e.g.*, *Ogio* v. *INS*, 2 F.3d 959, 960 (9th Cir. 1993) (dismissing petition for review filed while motion to reconsider was pending before Board, even though both INS and alien argued that court of appeals had jurisdiction); *Chu* v. *INS*, 875 F.2d 777, 779-780 (9th Cir. 1989) (dismissing petition filed by alien while motion to reopen or reconsider was pending before Board); *Fayazi-Azad* v. *INS*, 792 F.2d 873, 874 (9th Cir. 1986) (same). The significant backlog of cases before the Board also makes it relatively onerous to force an alien to wait for the Board's disposition of a motion to reopen or reconsider before seeking judicial review of the underlying order. See, *e.g.*, Pet. App. A7 (noting that "it took the Board of Immigration Appeals more than 17 months to reject as frivolous the motion for reconsideration filed here").

[6] See *INS* v. *Doherty*, 112 S. Ct. 719, 724 (1992) (explaining that motions to reopen and reconsider "derive solely from regulations promulgated by the Attorney General," and that "the Attorney General has 'broad discretion' to grant or deny such motions"); see also *Brotherhood of Locomotive Engineers*, 482 U.S. at 277-281 (discussing general principles governing judicial review of administrative denials of motions to reconsider).

[7] See *Bauge* v. *INS*, 7 F.3d 1540, 1542 (10th Cir. 1993) ("If a motion for reconsideration were to render an order nonfinal, petitioners would be in a position to delay deportation for a significant period of time."); *White* v. *INS*, 6 F.3d 1312, 1316 (8th Cir. 1993) (under rule that allows aliens to toll time for filing petition for re-

purpose" this Court has discerned in the jurisdictional framework set out in Section 1105a—to "abbreviate the process of judicial review of deportation orders in order to frustrate certain practices * * * whereby persons subject to deportation were forestalling departure by dilatory tactics in the courts," *Foti* v. *INS*, 375 U.S. 217, 224 (1963)—we submit that the courts of appeals should have authority to review a final order of deportation even if the alien has filed a motion to reopen or reconsider. Accordingly, the filing of such a motion should not toll the 90-day (or 30-day) period for seeking judicial review.[8]

Our understanding of the proper interpretation of Section 1105a(a) is bolstered considerably by the 1990 amendment that added a new paragraph (6) to Section 1105a(a).[9] Paragraph (6) states: "[W]henever a petitioner seeks review of an order under this section, any review sought with respect to a motion to reopen or reconsider such an order shall be consolidated with the review of the order." In our view, Paragraph (6) rests on the assumption that a court of appeals would have juris-

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view by filing motion to reopen, "there apparently is nothing to keep an alien from filing such motions *ad infinitum*"); *Alleyne* v. *INS*, 879 F.2d 1177, 1181 (3d Cir. 1989) ("In the immigration context, Congress has determined that the potential for abusive appeals outweighs efficiency concerns.").

[8] Governing regulations specifically provide that the filing of a motion to reopen or reconsider an order of the Board shall not serve to stay the execution of the Board's decision. 8 C.F.R. 3.8(a).

[9] The provision was added by Section 545(b)(3) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5065. Like the alteration of the period for filing a petition for review discussed in note 4, *supra*, Section 1105a(a)(6) applies to all final orders entered on or after January 1, 1991. 1990 Act § 545(g)(4), 104 Stat. 5067. Those provisions apply to this case because petitioner's final order of deportation was entered on July 26, 1991.

diction over a petition for review of an underlying order of deportation while a motion to reopen or reconsider was pending. If the court of appeals did not have jurisdiction over such a petition, there would be nothing to consolidate with the petition seeking review of the Board's disposition of the motion to reopen or reconsider, because the alien would file a single petition seeking review of both orders when the Board disposed of any motion to reopen or reconsider. See Pet. App. A8; *Bauge* v. *INS*, 7 F.3d 1540, 1542 (10th Cir. 1993); *White* v. *INS*, 6 F.3d 1312, 1317 (8th Cir. 1993); *Akrap* v. *INS*, 966 F.2d 267, 270-271 (7th Cir. 1992). But see *Ogio* v. *INS*, 2 F.3d 959, 960 (9th Cir. 1993).

2. As the court of appeals pointed out (Pet. App. A5-A6), the courts of appeals that considered the question before the 1990 amendment were deeply divided. Compare, *e.g.*, *Alleyne* v. *INS*, 879 F.2d 1177, 1181 (3d Cir. 1989) (time to file petition for review not tolled), with, *e.g.*, *Hyun Joon Chung* v. *INS*, 720 F.2d 1471, 1473-1474 (9th Cir. 1983) (time to file petition for review tolled), cert. denied, 467 U.S. 1216 (1984); *Fleary* v. *INS*, 950 F.2d 711, 712-713 (11th Cir. 1992) (same).[10]

There also is a conflict among the courts that have considered the question in cases arising since the 1990 amendment to Section 1105a(a). A majority of those courts have relied on the consolidation provision in the

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[10] See also *Attoh* v. *INS*, 606 F.2d 1273, 1275 n.15 (D.C. Cir. 1979) (time to file petition for review tolled only by good faith motions to reopen or reconsider); *Pierre* v. *INS*, 932 F.2d 418, 420-421 (5th Cir. 1991) (same). The Eighth Circuit expressly rejected that rule based on its view that "it is well beyond the scope of our role under the Immigration and Nationality Act (INA) as described by Congress to determine whether an alien has filed a motion to reopen or reconsider in 'good faith' in order to decide if we have jurisdiction." *White*, 6 F.3d at 1314.

new paragraph (6) of Section 1105a(a) to support the conclusion that a motion to reopen or reconsider does not toll the time to file a petition for review. See Pet. App. A8 ("Whatever the law may have been previously, we do not believe that the Ninth Circuit approach is consistent with the statute as amended in 1990."); *Bauge*, 7 F.3d at 1541-1542 (10th Cir. 1993); *White*, 6 F.3d at 1313-1317 (8th Cir. 1993); *Akrap*, 966 F.2d at 269-271 (7th Cir. 1992) ("In our view, the 1990 addition of Section [1105a(a)(6)] has put to rest any conflict that had previously existed on that issue.").

The Ninth Circuit, on the other hand, recently reaffirmed its view that a motion to reopen or reconsider tolls the time for filing a petition for review. *Ogio*, 2 F.3d at 960-961. In the opinion in that case, the Ninth Circuit acknowledged that the Seventh Circuit had relied on the 1990 amendment to Section 1105a to justify a different result, but concluded that it was appropriate to adhere to the view it had articulated in *Hyun Joon Chung*. 2 F.3d at 960.[11] Because the Ninth Circuit has declined to retreat from its view notwithstanding the acknowledged

[11] Although the opinion of the Eleventh Circuit in *Fleary* v. *INS*, 950 F.2d 711 (1992), stated that the filing of a timely motion to reopen or reconsider tolls the time for filing a petition for review even after the enactment of Section 1105a(a)(6), 950 F.2d at 713, that statement was not necessary to the decision. First, *Fleary* involved a final order of deportation issued on May 15, 1990, as to which Section 1105a(a)(6) did not apply. See note 9, *supra*. Second, the Eleventh Circuit actually denied relief in *Fleary*, on the ground that the alien had not filed a timely petition for review of the motion to reopen after the Board denied that motion. 950 F.2d at 712-713. Accordingly, the Eleventh Circuit's discussion of how it would dispose of a case in which an alien filed a single petition seeking review of a final order of deportation and of a subsequent motion to reopen or reconsider was entirely hypothetical.

circuit conflict, it is unlikely that the conflict will dissipate in the foreseeable future. Accordingly, review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

MARK C. WALTERS
LISA C. DORNELL
Attorneys

APRIL 1994

No. 93-1199

In the Supreme Court of the United States

OCTOBER TERM, 1994

MARVIN STONE, PETITIONER

v.

IMMIGRATION & NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S BRIEF ON THE MERITS

DAVID ERIC FUNKE
Kortz & Funke
Attorney for Petitioner
212 Elm Avenue
P.O. Box 296
Pewee Valley, KY 40056
(502) 241-8221

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QUESTION PRESENTED

WHETHER THE FILING OF A MOTION TO REOPEN OR RECONSIDER A FINAL ORDER OF DEPORTATION TOLLS THE TIME FOR SEEKING JUDICIAL REVIEW OF THAT ORDER.

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Jurisdiction is proper under 28 U.S.C. 1254(1). A writ of certiorari was filed within ninety days of the judgement by the U.S. court of appeals in the proceedings below, *Stone v. INS*, 13 F.3d 934 (6th Cir.1994).

JUDGEMENTS BELOW

Stone v. INS, 13 F.3d 934 (6th Cir.1994)

In re Stone, A# 21 029 325, BIA Dec., February 3, 1993 (unreported)

In re Stone, A# 21 029 325, BIA Dec., July 26, 1991, (unreported)

STATEMENT OF THE CASE

Petitioner Marvin Stone is a businessman and citizen of Canada. He last entered the U.S. in 1977 as a visitor. The Immigration and Naturalization Service ("INS") began deportation proceedings against him in 1987 on the charge of being a nonimmigrant who remained longer than permitted. (Cert. Pet. App. B-3) A "special inquiry officer" or "immigration judge" found him deportable as charged, and denied his applications for discretionary relief due to statutory ineligibility at the time. In particular, petitioner was denied the privilege of voluntary departure from the U.S., and denied suspension of deportation pursuant to 8 U.S.C. 1254. The statutory

ineligibility arose from petitioner's conviction for mail fraud that resulted in his incarceration for eighteen months. Mr. Stone finished his sentence in 1987. (Cert. Pet. App. B-11,12)

The petitioner filed a timely appeal to the Board of Immigration Appeals ("BIA") raising a number of legal and factual issues. The appeal was dismissed and the BIA entered a final order of deportation against Mr. Stone on July 26, 1991. *Id.*

In August, 1991, Petitioner filed a motion to reopen and reconsider the BIA's order of deportation, which it denied on February 3rd, 1993. (Cert. Pet. App. B-16)

Petitioner then filed a petition for review in the U.S. court of appeals for the sixth circuit, on March 25, 1993. Mr. Stone sought review of the BIA's order of July 26, 1991. *Stone v. INS*, 13 F.3d 934 (6th Cir. 1994). The sixth circuit denied the

petition because, inter alia, it held that it lacked jurisdiction to review the underlying order of the BIA because the time for filing had passed. *Id.*

SUMMARY OF ARGUMENT

Petitioner believes this Court should rule consistently with its holding in *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 96 L Ed 222, 107 S Ct 2360, (1987) which holds that a petition for review is timely if filed within the statutory period running after the denial of a motion to reopen or reconsider. The rationale underlying exhaustion doctrine is relevant, even though a motion to reopen is not needed to exhaust remedies. The Board of Immigration Appeals and our immigration judges deal with serious matters, such as the separation of American children from their parents, and the seeking of safe haven by people of disparate cultures from countries with complex political dynamics.

The BIA should be given the chance to correct its errors or evaluate the new evidence, before our federal courts are asked to rule.

Petitioner also believes that judicial economy and efficiency is best served by allowing tolling of the time for judicial review. The view of the Solicitor General and the court below would mandate the simultaneous seeking of judicial and administrative litigation. This is a recipe for cumbersome and repetitive activity in our appellate courts. Moreover, it is contrary to a 1990 mandate from Congress that the seeking of judicial review for a deportation order and the seeking of review for the ruling on a motion to reopen or reconsider shall be consolidated.

Finally, the Solicitor General and several circuits express concerns that petitioner's view allows aliens to abuse

the system and delay enforcement of our immigration laws. This concern was found to be groundless in a congressionally mandated study conducted by our Attorney General.

ARGUMENTS OF PETITIONER

I. INTRODUCTION

The Immigration and Nationality Act, (the "INA") 66 Stat. 163, 8 U.S.C. 1101 et seq., declares that judicial review of deportation orders is governed by the Hobbs Act, 28 U.S.C. 2341-51. *See* 8 U.S.C. 1105a (a). However, the INA prescribes a number of specific procedures for "judicial review of all final orders of deportation ...." *Id.* Unlike the Hobbs Act, "a petition for review may be filed not later than 90 days after the date of the issuance of the final deportation order, or in the case of an alien convicted of an aggravated felony,[1]

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[1]"The term "aggravated felony" means murder, any illicit trafficking in any controlled substance ... or firearms ..., [money laundering], any crime of violence

not later than 30 days after the issuance of such order." 8 U.S.C. 1105a (a)(1).

An order of deportation is final when the immigration judge's decision is affirmed by the Board of Immigration Appeals (BIA), or when no timely appeal is taken from an order of an immigration judge. 8 C.F.R. 3.37. Statute dictates that "[a]n order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws ...." 8 U.S.C. 1105a(c).

A motion to reopen or reconsider may be brought upon written motion to the BIA in cases where a BIA decision has been rendered. 8 C.F.R. 3.2, 3.8.

... for which the term of imprisonment imposed ... is at least five years, or any attempt or conspiracy to commit any such act." 8 U.S.C. 1101 (a)(43)."

This Court held in *Giova* v. *Rosenberg*, 379 U.S. 18, (1964) that motions to reopen were within the ambit of the term "final order." A year later, the ninth circuit relied on *Giova* to hold that if a motion to reopen were filed within the period for judicial review of a BIA order, and if a petition for review were filed within six months (the period allowed to seek judicial review at the time) of the ruling on that motion to reopen, the circuit court had jurisdiction over both orders. *Bregman v. INS*, 351 F.2d 401, 402. (9th Cir. 1965). *See also Chudshevid v. INS*, 641 F.2d 780, 783-84 (9th Cir. 1981); *Hyun Joon Chung v. INS*, 720 F.2d 1471, 1473,1474 (1983); *Fayazi-Azad v. INS*, 792 F.2d 873 (9th Cir. 1986); *Chu. v. INS*, 875 F.2d 777 (9th Cir.1989). The underlying rationale is that the filing of a motion to reopen or reconsider renders the BIA's order non-

final for the purposes of judicial review. *See, Id.* at 780.

The eleventh circuit also follows the rule in deportation proceedings that the time for judicial review is tolled by filing a motion to reopen. *Fleary v. INS*, 950 F.2d 711 (11th Cir. 1992).

Two additional circuits hold that "good faith petitions for administrative relief may toll or suspend the running of the time limit." *Pierre v. INS*, 932 F.2d 418, 421 (5th Cir. 1991), citing *Attoh v. INS*, 606 F.2d 1273,1276 n.15 (D.C. Cir. 1979). [2]

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[2] The circuits which allow petitioner's view that the filing of a motion to reopen tolls the time for judicial review --- a view that the Solicitor General believes allows abuse of our immigration laws --- are circuits that contain our border states. The INS reports that three of these states --- California, Texas, and Florida -

However, twenty one years after *Bregman*, a split in the circuits emerged in *Nocon v. INS*, 789 F.2d 1028, 1033 (3d. 1986), which held against tolling the time period for judicial review, on the basis that it contravened a desire of Congress to "prevent undue delay in deportation once an alien's immigration status had been decided." A number of circuits have recently held that the filing of a motion to reopen does not toll the time for seeking judicial review. *Akrap v. INS*, 966 F.2d 267 (7th Cir. 1992); *Bauge v. INS*, 7 F.3d 1540 (10th Cir. 1993); *White v. INS*, 6 F.3d 1312 (8th Cir. 1993); and, of course, the

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--- have our highest numbers of criminal aliens. Department of Justice, Immigration & Naturalization Service, *Report on Criminal Aliens*, April, 1992, at 8. Presumably, these diverse circuits would know best how our immigration laws should be interpreted in a fashion that is in the public interest.

decision below, *Stone v. INS*, 13 F.3d 934.

II. THE MAJORITY RULE ELSEWHERE IN ADMINISTRATIVE LAW --- THAT A MOTION TO REOPEN TOLLS THE PERIOD FOR JUDICIAL REVIEW --- SHOULD BE FOLLOWED IN IMMIGRATION

This Court held that a petition for administrative reconsideration stayed the running of the Hobbs Act's limitation period for the purpose of judicial review until that petition had been acted upon by the agency. *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, at 284, 96 L Ed 2d 222, 107 S. Ct. 2360. This Court arrived at that result notwithstanding statutory language making it clear that final agency actions are final for judicial review, regardless of motions to reopen, reasoning that such language "has long been construed by this and other courts merely to relieve parties of the *requirements* of petitioning for rehearing before seeking judicial review ...." Id. at 285. [emphasis

original] Similarly, regulations state that a BIA order is "final," but the INA does not require an alien to move for reopening to exhaust his remedies because reopening is discretionary, not a matter of right. *See generally White*, 6 F. 3d at 1315.

Federal appellate procedure also recognizes that judicial review should be stayed pending the outcome of certain motions, such as a motion for relief from judgement due to newly discovered evidence, Fed. R. Civ. P. 60(b), or a motion for new trial or to alter or amend judgement, Fed. R. Civ. P. 59. *See* Fed. R. App. P. 4(4). [3] This Court has a rule that the time for filing a "petition for writ of certiorari runs from the date of the judgement or

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[3]The INS itself has used Fed. R. App. Proc. 4(4) to support Petitioner's position when it is to the advantage of the INS. See, e.g. *Chu. v. INS*, 875 F.2d 777,779 (9th Cir. 1989).

decree sought to be reviewed is rendered," *except* that "if a petition for rehearing is timely filed in the lower court by any party ... the time for filing the petition for a writ of certiorari for all parties (whether or not they requested rehearing ...) runs from the date of the denial of the petition for rehearing ...." R. Sup. Ct. 13.4

These precedents and rules are well founded, and should not be deviated from in the context of deportation proceedings.

A. POLICIES OF JUDICIAL ECONOMY AND EFFICIENCY ARE ADVANCED BY ALLOWING TOLLING.

If the filing of a motion to reopen or reconsider tolls the time for seeking judicial review, then the circuit court is in its best position to dispose of all of the agency's actions in one clean, consolidated review of the agency action.

If the alien's motion to reopen or reconsider is granted, and relief is ordered, then she has no need to use the court's time seeking judicial review. This would not be the case if she could not toll. She would have filed a petition for review along with her motion and consumed the court's resources needlessly. If motion to reopen is granted, but relief is again denied by the immigration judge and/or the immigration judge, then there is a considerable amount of additional material in the record that will be subject to issues for judicial review.

If the alien is forced to file a petition for review, before the motion to reopen and reconsider has been filed or decided, the circuit court faces a messy situation upon denial of the motion. Perhaps a new briefing schedule will have to be ordered in order to "consolidate" the

two reviews, causing delay, additional costs to the parties, and the court.

Even worse, if the motion to reopen is decided after dismissal of the petition for review, then the aggrieved party is allowed to file yet another petition for review. As Justice Warren stated for this Court, "Bifurcation of judicial review of deportation proceedings is not only inconvenient; it is clearly undesireable ...." *Foti v. INS* 375 U.S. 217, 232, 84 S. Ct. 306 (1963)

Under regulations in effect at the time this brief is being submitted, there is no time limit for the filing of a motion to reopen or reconsider. The opinion below could potentially create *more*, rather than less, dilatory practice. The filing of a petition for review brings an automatic stay of deportation. 8 U.S.C. 1105a(a)(3). A motion to reopen does not. 8 C.F.R. 3.8(a) Thus, an alien who is <u>required</u> to

seek judicial review --- or lose it --- could make the tactical choice to wait until the petition for review is filed or decided before exhausting his administrative remedies.

B. COMPETENT DECISIONMAKING IS ENHANCED BY ALLOWING TOLLING OF THE PERIOD FOR JUDICIAL REVIEW.

As the eleventh circuit reasoned, tolling the period for judicial review "gives the BIA 'the opportunity to correct [its] own alleged errors, and allowing [it] to do so prevents unnecessary burdens being placed on the courts of appeal.'" *Fleary*, at 713, citing *United States v. Ibarra*, ___ U.S. ___, 112 S. Ct. 4, 116 L.Ed. 2d 1 (1991).

This court should be concerned with allowing an a non-citizen to complete his motion to reopen, if he wishes, without

jeopardizing his opportunity for judicial review. While Congress and the executive branch is justifiably concerned with expelling undesirables, it is also concerned with due process in deportation proceedings. And, our deportation statutes have humane provisions that are in the national interest. This court has noted that deportation is a "sentence to a life in exile," *Jordan v. De George*, 341 U.S. 233 (1951) (J. Jackson, dissenting), and "an event that results in loss of property or life or all that makes life worthwhile," *Ng Fong Ho v. White*, 259 U.S. 276 (1922). There are many situations where an alien could raise significant issues on a motion to reopen, issues which the agency should deal with instead of immediately forcing the alien into federal court.

For example, our laws protect asylum

seekers under binding international treaty obligations. Protocol Relating to the Status of Refugees, 19 U.S.T. 6223; T.I.A.S. 6577, incorporating Geneva Convention Relating to the Status of Refugees, 19 U.S.T. 6260; T.I.A.S. 6577; Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 109. These asylum seekers are often in deportation proceedings. Motions to reopen, when they are sought, are often sought with respect to asylum requests, due to changed social and political conditions in the alien's homeland. [4] The "Supreme Court is reluctant to impute to Congress an intention that a federal statute dealing

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[4] Under the prospective regulations promulgated by the Attorney General at 59 Fed. Reg 29386, motions to reopen based on changed country conditions need *not* be filed within 20 days of final BIA order.

with the status of aliens is to be construed in such a way as to make likely curtailment of [administrative policies reflecting humane qualities]." *Leng May Ma v. Barber*, 357 U.S. 185, 78 S Ct 1072.

The INA also allows aliens in deportation proceedings to have their status adjusted to that of an alien lawfully admitted for permanent residence if the Attorney General is satisfied that three criteria are met, and that relief is warranted. The alien must be physically present in the U.S. for at least seven years, possess good moral character, and prove that deportation would pose "extreme hardship" or "exceptional and extremely unusual hardship" to the alien, or his U.S. citizen spouse, child, or parent. 8 U.S.C. 1254. The BIA has articulated a number of factors to be considered in such an

application, and motions to reopen are sometimes filed based on new equities to be considered. The BIA does make errors. *See Babai v. INS*, 985 F.2d 252 (6th Cir. 1993) (Petition granted, BIA failed to consider hardship to U.S. citizen child).

There is also the possibility that an alien could seek a motion to reopen or reconsider and fail to seek judicial review based on incorrect advice. Aliens have the "privilege" of having counsel in deportation proceedings, but at no expense to the government. 8 U.S.C. 1252(b)(2). Sometimes lacking language skills, aliens are susceptible to bad advice, if they obtain any advice. Even the petitioner, who had legal training himself, sought but obtained erroneous advice regarding the filing period for judicial review. *Stone*, 13 F.3d at . The importance of judicial review

should not be underestimated. *See Babai v. INS, 985 F.2d 252; Akinyemi v. INS*, 969 F.2d 285, 289-90 (7th Cir. 1992) (J. Ripple) (petition granted, BIA abused discretion in deportation proceeding involving criminal alien who had American family and genuine evidence of rehabilitation.)

C. UNWARRANTED DELAYS ARE NOT INHERENTLY PROBLEMATIC.

The Solicitor General has maintained that permitting a delay in judicial review "is not conducive to orderly administration of the immigration laws, because it is likely to lead to lengthy delays ...." (Resp. Cert. Br. 7) This concern was cited by the initial circuit that differed with the ninth circuit on the issue of tolling.

As discussed above, there are many

reasons why a non-citizen should be allowed to follow through with a motion to reopen, if he chooses, without losing the opportunity for judicial review. But, it should also be noted, that any "public costs" of such a policy are minimal.

1. ABUSES ARE NOT A SIGNIFICANT PROBLEM.

Congress in 1990 required the Attorney General to conduct a study of abuses associated with motions to reopen. IMMACT sec. 545 (c). That study found that there was "no pattern of abuse by aliens who fail to consolidate their applications for relief," and that *motions to reopen "constitute an extremely low percentage of the total case load" of deportation cases.* [emphasis added] "Finally, and perhaps most persuasively, an informal survey of a cross section of immigration judges ... indicates that there is *no evidence of aliens abusing*

the system." Reprinted in H. SKLAR & S. FOLINSKY, THE IMMIGRATION ACT OF 1990 HANDBOOK (1993), at A11E-1,2. (Appendix "A")

Congress has enacted a number of provisions in recent years to enhance our system for apprehending and deporting aliens with criminal convictions.[5] Those whom congress has deemed the most undesireable --- aggravated felons and particularly drug traffickers --- do not have the same types of relief available to them in deportation proceedings as other aliens might have. Aggravated felons are ineligible for voluntary departure, asylum, and suspension of deportation.[6] They thus have

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[5] See generally IMMACT sec. 501-515; Anti-Drug Abuse Act of 1988, Pub. L. 100-690, sec. 7341-7350.

[6] *See Id.*; U.S.C. 1152 (d), 1254 (e)(2), 1254(a)(1) & 1101(f)(8).

fewer issues for litigation and review, and thus the Attorney General can deport them in a more expeditious fashion. *See, e.g. Craddock v. INS*, 997 F.2d 1176 (6th Cir. 1993) (alien, who was eligible for INA 212(c) relief, concluded her criminal trial, deportation hearings, administrative appeal, and petition for review within two years). Thus, there is less potential for dilatory tactics for these aliens.

2. THERE ARE OBSTACLES TO DILATORY, ABUSIVE, OR MERITLESS ACTIONS.

The requirements for a motion to reopen are strict.

> Motions to reopen in deportation proceedings shall not be granted unless it appears to the board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully

explained to him and an opportunity to apply therefor was afforded him at the former hearing ...." 8 C.F.R. 3.2

This Court has stated that there are at least three independent grounds under which the BIA might deny a motion to reopen. *INS v. Abudu*, 485 U.S. 94, 108 S. Ct. 904, 99 L Ed 2d 90 (1988). The BIA may deny reopening even in the absence of opposition or response from the INS. *Limsico v. INS*, 951 F.2d 210 (9th Cir. 1991). [7]

The Immigration Act of 1990 requires the Attorney General to promulgate rules restricting the amount of time in which

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[7] Indeed, many agencies have regulations stating that a motion to reopen or reconsider will be deemed to be denied if the agency fails to act on it within a certain time period. *See* 10 C.F.R. 2.786(-c), 430.48(c), 501.134(f), 590.504 (Dept. of Energy); 16 C.F.R. 4.11(a)(1)(i ii)(O) (F.T.C.), 18 C.F.R. 385.916(b); 20 C.F.R. 31.14 (Dept. State), 29 C.F.R. 2700.70(g) (Mine Safety); 43 C.F.R. 431.8(6) (Dept. of Interior).

motions to reopen or reconsider can be filed. IMMACT sec. 545 (d). It also requires the Attorney General to set limits on the number of such motions that can be filed. *Id.* Legislative history expresses preference that the Attorney General promulgate a regulation that motions to reopen and reconsider be "made within 20 days of the date of the final determination in the proceeding and that such motions be limited to one motion to reopen and one motion to reconsider." H.R. Conf. Rep. No. 955, 101st. Cong., 2d Sess. p. 133 (1990). The Department of Justice has promulgated a regulation consistent with this legislative history. 59 Fed. Reg. 29386 (June 7, 1994). (Comment period expires August 4, 1994) The spectre of an endless cycle of motions to reopen and appeals, as bemoaned in a number of courts, seems to be illusory. E.g. *White 6 F.3d* at 1316; *Stone*, 13 F.3d at .

There are still more factors to discourage abusive motions to reopen. The Immigration Act of 1990 provided that

> The Attorney General shall, by regulation ---
>
> (1) define in a proceeding before [an immigration judge or the BIA] frivolous behavior for which attorneys may be sanctioned,
>
> (2) specify the circumstances under which an administrative appeal ... will be considered frivolous ... and dismissed,
>
> (3) impose appropriate sanctions (which may include suspension and disbarment) in the case of frivolous behavior.
>
> Nothing in this subsection shall be construed as limiting the authority of the Attorney General to take actions with respect to inappropriate behavior. 8 U.S.C. 1252b(d).

Regulations are now in force regarding attorney sanctions for frivolous behavior in immigration proceedings. 8 C.F.R. 292.3 (15), (16).

Finally, an alien who is desperate to remain in the U.S. and who files a meritless motion to reopen or reconsider before

seeking judicial review does so at his peril. 8 C.F.R. 3.8(a) provides that "[t]he filing of a motion to reopen or a motion to reconsider shall not serve to stay the execution of any decision made in the case. Execution of such decision shall proceed unless a stay of execution is specifically granted by the Board or the officer of the Service having administrative jurisdiction over the case." This is contrary to the result if he promptly seeks judicial review, which provides an automatic stay of deportation to all aliens except aggravated felons. 8 U.S.C. 1105a(a)(3).

III. STATUTE PERMITS THE TOLLING EFFECT OF THE FILING OF A MOTION TO REOPEN OR RECONSIDER

A.

The Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978, contained the

following amendment to INA section 106:

> [W]henever a petitioner seeks review of an order under this section, any review sought with respect to a motion to reopen or reconsider such an order shall be consolidated with the review of the order.

IMMACT sec. 545(b)(3) This amendment has been cited by circuits on both sides of the tolling issue in support of their position. Plainly, the amendment is triggered by the filing of a petition for review of a final order of deportation from the BIA. It then requires any review of a motion to reopen or reconsider to be consolidated with the review of the final order of deportation.

This amendment is most easily given effect when the motion to reopen has already been decided at the time the petition for review is filed. And this situation is most easily enabled by permitting tolling.

Thus, the alien files her petition for review of the original deportation order, and she is on notice that any review of the motion to reopen must be consolidated with review of the original order. Prior to 1990, the alien could have sought two separate reviews, one for each order. [8]

On the other hand, in the case of an alien who seeks reopening or reconsideration at roughly the same time as judicial review, as required by the decision below, some courts on both sides of the tolling

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[8] The amendment could also be given effect when the alien files a petition for review first, and subsequently files the motion to reopen. The circuit court would have jurisdiction. *Ogio v. INS* 2 F.3d 959, 960-61 (9th Cir. 1993) Aliens seeking a motion to reopen or reconsider must state whether their deportation order is subject to judicial proceedings. 8 C.F.R. 3.8.

issue will proceed with the review despite a pending motion to reopen. *Alleyne v. INS*, 879 F.2d 1177,1181-82 n.748 (3d Cir.1989); *Berroteran-Melendez v. INS*, 955 F.2d 1251, 1255 (9th Cir. 1992) (for motions filed *after* the petition for review was filed). This enables the problem of repetitive actions in federal court when the motion is decided during or after the review.

Other courts will hold the review in abeyance until the BIA has adjudicated the motion to reopen. *Lozada v. INS*, 857 F.2d 10,12 (1st Cir. 1988) In this instance, any putative advantage in following the Solicitor General's view is nullified, since the effect if tolling is the same as holding a review in abeyence. In either event, the review does not proceed.

Indeed, if the circuit court enters a

judgement before the BIA disposes of the motion to reopen, the alien can then file a second petition for review of the adjudicated motion to reopen. *Giova*, 379 U.S. 18. This defeats the required consolidation, and the rule that "no statute ought to receive a construction that will render it nugatory, or which prescribes a rule utterly impracticable ...." *U.S. v. Tappan*, 11 Wheat 419, 426, 6 L.Ed. 509 (1826).

B.

This Court assumes that Congress was aware of existing law when it passes legislation. *Miles v. Apex Marine Corp.* 111 S.Ct. 317, 112 L.Ed2d 275. This includes an awareness of judicial interpretations given to incorporated law, insofar as it affects the new law. *Lorillard v. Pons*, 434 U.S. 575, 581, 55 L Ed. 2d 40, 98 S Ct 866. In this matter, the conflict that arose

between the circuits on the tolling issue existed at the time the consolidation provision in the Immigration Act of 1990 was introduced and passed. Yet, there is no plain directive in IMMACT on the issue of tolling. Thus, it cannot be claimed that Congress intended a deviation from what was already the rule in administrative law, as announced in, e.g. *Brotherhood of Locomotive Engineers.* The eleventh circuit found "no legislative history of 8 U.S.C. 1105a(a)(6) that might prove helpful in determining" the tolling issue. *Fleary v. INS*, 950 F.2d 711, 713 (11th Cir.1992).

C.

An examination of the structure of the entire text of the relevant section of the Immigration Act of 1990 also yields little support for the opinion below.

The amendment is found in section 545, subtitled "Deportation Procedures; Required Notice of Deportation Hearing; Limitation on Discretionary Relief." While congress shortened the time for seeking judicial review in section 545(b), the same section as the consolidation requirement, it said nothing about motions to reopen, tolling, or how the time is computed.

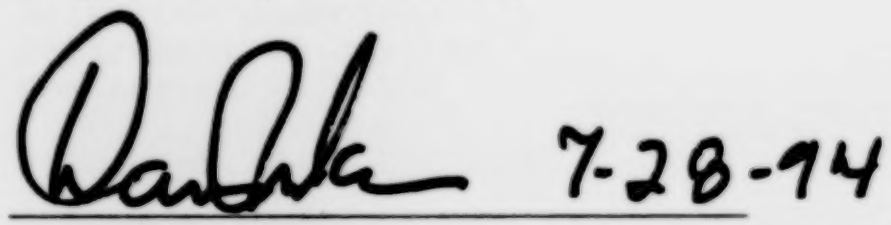
The next section, section 545 (c), also deals with "consolidation" of actions in deportation proceedings. It deals with the concern that aliens might be seeking one type of relief, say asylum, at their administrative hearing, and then taking another bite of the apple in a motion to reopen by asking for, say, suspension of deportation. This is the type of abuse of the system that the Attorney General found non-existent in his study, as noted earlier. But, if any inference is to be

drawn from section 545(c), it is that Congress aims for a single, linear series of actions where a certain type of proceeding is not repeated. In 545(c), Congress was concerned about aliens returning back to the "hearing on the merits" stage of deportation after they had already been there. Likewise, in petitioner's view, Congress does not want aliens returning to circuit court (or repeating steps in circuit court) after they have been there already. This can only be achieved by permitting a motion to reopen or reconsider a final order of deportation to toll the time for seeking judicial review of that order.

CONCLUSION

WHEREFORE, Petitioner seeks a remand of this matter to the circuit court of appeals to allow him the opportunity to file a petition for review under 8 U.S.C. 1105a.

Respectfully submitted,



David E. Funke
Attorney for Petitioner
Pro Bono Publico
212 Elm Avenue
P.O. Box 296
Pewee Valley KY 40056
502/241-8221

CERTIFICATE OF SERVICE

Undersigned counsel certifies that three copies of this brief have been served on appropriate counsel by depositing them in the U.S. Mail, postage prepaid, to the following address, on the undersigned date:

Hon. Drew Days
Solicitor General
Department of Justice
Washington DC 20530

Attn: Hon. Beth Brinkman

7-28-94

David Funke

STATEMENT ON JOINT APPENDIX

The solicitor general and counsel for the petitioner have only designated items included in the petition for writ of certiorari for the joint appendix, namely the opinions and judgements below. Per Sup. Ct. R. 26, no additional joint appendix is being reproduced.

[A11E-1]

ATTORNEY GENERAL'S REPORT TO CONGRESS ON CONSOLIDATION OF REQUESTS FOR RELIEF FROM DEPORTATION

Introduction:

Section 545(c) of the Immigration Act of 1990 mandates that the Attorney General submit a report to Congress on perceived abuses associated with the failure of aliens to consolidate requests for discretionary relief before immigration judges at the first hearing on the merits. The Department has examined its current procedures to determine what safegaurds if any, exist to gaurd against the possibility of aliens abusing the hearing process by not consolidating their requests for relief. The Department has also examined statistical information which defines the possible parameters of the problem when compared against the entire case load. Finally, the Department has examined a cross section of immigration judges to

determine whether or not abuses of the kind stated in section 545(c) are widespread and significant.

The Department's conclusion is that there is no pattern of abuse by aliens who fail to consolidate their applications for relief. Current procedures, regulations, and case law contain restraictions to gaurd against such abuses. Also, an examination of statistical information establishes that the number of cases in which multiple applications are filed and [p.2, A11E-2] the number of cases in which motions to reopen are filed constitute an extremely low percentage of the total case load. Finally, and perhaps most persuasively, an informal survey of a cross section of immigration judges, those who deal with the deportation cases say-to-day, indicates that there is no evidence of aliens abusing the system by failing to consolidate the filing of applications for relief.

Current Law and Procedure:

Current law and procedure strongly discourage the piecemeal filing of applications for relief and safegaurd against abuse. The consolidation of filing for relief of deportation is mandatory under current law.

At the initial deportation proceeding before an immigration judge, typically a master calendar call, deportability is conceded and the immigration judge inquires as to what relief will be sought by the respondent. The respondent, often through counsel, indicates as to what relief will be sought, and is granted time to file the appropriate applications. In the typical case, the applications are subsequently filed and an individual merits hearing is held in which all applications are considered by the immigration judge. At the end of the merits hearing, the immigration

judge makes a decision on all forms of relief. Appeal rights are available to the Board of Immigration Appeals (BIA).

[p. 3, A11E-3]

Applications for relief which are made subsequent to a hearing must be made in conjunction with a motion to reopen. The motion to reopen, in order to be successful, must meet stringent requirements of 8 C.F.R. 3.2 and 3.8 (relating to the BIA) or 8 C.F.R. 3.22 and 8 C.F.R. 242.22 (relating to immigration judges). These sections read together clearly provide that motions to reopen must, among other things, present new evidence which was not available at the prior proceeding. These regulatory requirements assure that a motion to reopen will not be granted unless the evidence was not available previously. Therefore, the abuses described in section 545(c) are largely eliminated. In addition, current

case law undergirds the regulations by stressing that new evidence as well as a prima facie case and a favorable case on discretion must all be presented before a motion to reopen is granted. See Matter of Barrera, 19 I&N Dec. 837 (BIA 1989); Matter of Sipus, 14 I&N Dec. 229 (BIA 1972); Matter of Lam, 14 I&N Dec. 98 (BIA 1972); also see, *INS v. Wang*, 450 U.S. 139 (1981). All of these requirements in current law provide ample protection against the abuses of not consolidating applications for relief as envisioned in section 545(c).

Under current law, it should also be noted that a stay of deportation is not automatic upon the filing of a motion to reopen. See 8 C.F.R. 3.6, 3.8, and 8 C.F.R. 242.22. Therefore, if an alien were to file an abusive, unmeritorious motion to reopen, attempting to file for relief that should [p. 4, A11E-4] have been applied for at an

earlier hearing, there is no reason why that alien cannot be deported immediately absent the granting of a stay by the immigration judge or the BIA. In sum, the current law constitutes a strong disincentive for piecemeal filing of motions for relief and creates a strong incentive for consolidated filings.

Statistical Examination:

An examination of the total number of cases in which multiple applications and motions to reopen were filed, [1] compared to the total number of cases, clearly establishes a low possibility of abuse, as illustrated by the following statistics:

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[1] These statistics exclude voluntary departure which is a minimal routine relief from deportation which is almost always requested as an alternate to other more substantive reliefs.

FY	TOTAL DEPORT. COMPLETED	DEPORT COMPLETIONS W/MULTIPLE APPLICATIONS	MOTIONS TO REOPEN
88	78,711	877	2,081
89	102,479	723	2,142
90	106,150	932	2,474
91 [2]	60,782	733	1,531

[p. 5, A11E-5]

As can be seen from the statistical information, the total number of cases that could possibly contain the abuses described in section 545(c) are less than five percent of the total. In fact, due to the safegaurds in current law, and as confirmed by our immigration judges (see below), even in this limited number of cases there is an absence of abuse.

The EOIR computerized information system tracks the applications for relief filed in each deportation case, but does not indicate when each application was filed. The statistical information

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[2] Based on six months of data.

presented shows all cases in which multiple applications were filed, but not whether they were filed together or in series. We know from surveying immigration judges, however, that in the majority of cases the multiple applications are submitted at the same time. This further confirms the absence of a pattern of abuse by aliens regarding the submission of applications for relief from deportation.

Immigration Judges Survey:

An informal survey of the Immigration Judges Advisory Committee was conducted in April 1991. This committee consists of a cross section of immigration judges from eight cities. These immigration judges are highly regarded for their experience and knowledge and are called upon by the chief immigration judge to advise him in matters affecting the immigration adjudication process nationwide.

The immigration judges surveyed unanimously concluded that there was no pattern of abuse associated with aliens not consolidating their applications for relief. They felt that the current case law, regulations and immigration judges sound discretion were adequate to discourage and basically eliminate the possibility of abuse that might be caused by an alien filing applications piecemeal in an effort to delay deportation. They had simply not experienced a problem in this area.

The immigration judges indicated that those who file subsequent applications for relief do so mainly based on alleged changed circumstances and new evidence. They stressed that motions to reopen are scrutinized to determine if the evidence in the motion is new and was not available at the prior proceeding. If the application

could have been presented previously, that motion would be generally denied. They also stressed that since there is no automatic stay on motions to reopen, the Immigration and Naturalization Service is free to deport an individual while a motion is pending, absent a specific grant of a stay of deportation.

Conclusion:

Based on a review of the current law, statistical information, and a survey of immigration judges, the Department concludes that there is no pattern of abuse by aliens because [p. 7, A11E-7] of their failure to consolidate requests for relief from deportation before immigration judges. The total number of multiple applications in cases and motions to reopen is relatively low, and the majority of subsequent applications are based upon an allegation of new facts, which is required by the regulations before an alien's case

may be reopened.

Because there is no evidence of the type of abuse cited in section 545(c), the Department is of the opinion that current law is sufficient to gaurd against further problems in this area. We will, of course, continue to monitor this issue and stand ready to implement new restrictions, if the situation warrants.

No. 93-1199

In the Supreme Court of the United States

OCTOBER TERM, 1994

MARVIN STONE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
BETH S. BRINKMANN
Assistant to the Solicitor General
LISA DORNELL
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the filing of a motion requesting that the Board of Immigration Appeals reopen or reconsider a final deportation order postpones the running of the 90-day period for seeking judicial review of such an order under 8 U.S.C. 1105a(a)(1) (Supp. IV 1992).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 13 F.3d 934. The decisions of the Board of Immigration Appeals (Pet. App. B1-B15, B16-B19) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1994. The petition for a writ of certiorari was filed on January 26, 1994, and was granted on May 23, 1994. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory provisions, 8 U.S.C. 1103 and 1105a(a) (1988 & Supp. IV 1992), and regulatory provisions, 8 C.F.R. 3.2, 3.6(a) and (b), 3.8 and 243.1, are set forth at App., *infra,* 1a-10a.

STATEMENT

This case concerns the deadline established by the Immigration and Nationality Act (INA), as amended, by which a petition for judicial review of a final deportation order must be filed. Under 8 U.S.C. 1105a(a)(1) (Supp. IV 1992), "a petition for review may be filed not later than 90 days after the date of the issuance of the final deportation order." Implementing regulations provide that "an order of deportation * * * shall become final upon dismissal of an appeal by the Board of Immigration Appeals." 8 C.F.R. 243.1.

The court of appeals found that the order of the Board of Immigration Appeals (Board) dismissing petitioner's appeal of the immigration judge's deportation order was final upon issuance. The court further held that petitioner's motion requesting that the Board reopen or reconsider that order did not postpone the 90-day period within which to petition for review of it in the court of appeals. Because petitioner did not file a petition for judicial review of the Board's final deportation order until more than a year after it was issued, the court held that the petition was out of time under Section 1105a(a)(1).

1. Petitioner is a citizen of Canada who entered the United States as a nonimmigrant visitor for business in 1977 and has resided in the United States since that date.[1] On January 2, 1983, petitioner was convicted of conspiracy and mail fraud, in violation of 18 U.S.C. 371 and 1341. He was sentenced to three years' imprisonment on one count and received a five-year suspended sentence on other counts, with probation imposed for five years. See Pet. App. A2, B2-B3. Petitioner's convictions were affirmed on appeal, *United States* v. *Stone*, 748 F.2d 361 (6th Cir. 1984); see Pet. App. B3, and he served approximately 18 months in a federal correctional institution on the three-year sentence. *Id.* at A2.

2. In March, 1987, the Immigration and Naturalization Service (INS) served petitioner with an order to show cause why he should not be deported from the United States under 8 U.S.C. 1251(a)(2),[2] on the ground that he is a nonimmigrant who remained in the United States beyond the period authorized by law. Admin. Rec. (A.R.) 362. Following a deportation hearing, an immigration judge determined that petitioner is deportable and ordered him deported.[3] A.R. 109-115. The judge explained that prior to 1978, regulations limited to six months the period of time that aliens admitted as nonimmigrant visitors for business could remain in the United States without obtain-

[1] The court of appeals and the Board relied on petitioner's admission that he entered the United States in 1977. Pet. App. A2, B4. At one point, however, the Board indicated that petitioner entered in 1978. *Id.* at B2. That statement appears to be erroneous. Whether petitioner entered in 1977 or 1978 has no effect on petitioner's immigration status, however, because the length of his stay in this country without obtaining an extension from the INS was longer than permitted in either event. See note 4, *infra*.

[2] This section was recodified in 1990 and is now found at 8 U.S.C. 1251(a)(1)(B) (Supp. IV 1992). See Immigration Act of 1990, Pub. L. No. 101-649, § 602(a), 104 Stat. 5077-5079. The new version does not apply, however, to cases, such as petitioner's, in which notice was provided prior to March 1, 1991, of deportation proceedings. See Immigration Act of 1990, Pub. L. No. 101-649, § 602(d), 104 Stat. 5082.

[3] The INA authorizes the Attorney General to delegate her powers and duties under the Act to other government officials. 8 U.S.C. 1103(a). The Attorney General has delegated the power to determine deportability and to issue deportation orders to immigration judges (see 8 U.S.C. 1252(b)), whose decisions are subject to review by the Board of Immigration Appeals. 8 C.F.R. 3.1(b)(2), 3.10, 242.8, 242.21.

ing an extension of time to stay. See 8 C.F.R. 214.2(b) (1977).[4] The judge reasoned that based on petitioner's testimony, he is an alien who entered the United States in 1977 as a nonimmigrant visitor for business purposes, did not obtain any extension of time to remain in the United States, remained longer than six months, and therefore is deportable under Section 1251(a)(2).

The immigration judge denied petitioner's application under 8 U.S.C. 1254(a) for suspension of deportation.[5] Under Section 1254(a)(1), the Attorney General is

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[4] 8 C.F.R. 214.2(b) (1977) provided:

> *Visitors.* The classification of visitors in the Act has been subdivided for visa, admission, and extension purposes into visitors for business (B-1) and visitors for pleasure (B-2). A B-1 visitor may be admitted for an initial period of not more than six months and may be granted extensions of temporary stay in increments of not more than six months. A B-2 visitor shall ordinarily be admitted for a period of not more than six months, but may be admitted for a longer period not exceeding one year if the admitting immigration officer determines that emergent, compelling, or other special circumstances exist warranting such longer admission period.

In March, 1978, the regulation was modified to provide that B-1 and B-2 visitors were to be treated the same – both would "be admitted for an initial period of not more than 1 year and may be granted extensions of temporary stay in increments of not more than 6 months." 8 C.F.R. 214.2(b) (1979); see 43 Fed. Reg. 12,674 (1978). In petitioner's case, because he stayed longer than one year without obtaining an extension, he is deportable regardless of whether he was a visitor for business or for pleasure and regardless of whether he entered in 1977 or 1978.

[5] The immigration judge also denied petitioner's request for a further continuance in order to make a collateral attack on his criminal conviction. A.R. 111. The immigration judge explained that petitioner's conviction had been affirmed on direct appeal and that petitioner had had ten months since the issuance of the order to show cause during which he could have pursued collateral relief. *Id.* at 111-112.

authorized to suspend the deportation of an alien who has been physically present in the United States for at least seven years immediately preceding his application if the person is "of good moral character," and if his deportation would result in extreme hardship to the alien or to an immediate relative who is a citizen or lawful permanent resident of the United States. A person cannot meet the "good moral character" requirement, however, if he was "confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such [seven-year] period." 8 U.S.C. 1101(f)(7). The immigration judge concluded that petitioner was ineligible for suspension of deportation because his incarceration for approximately 18 months based on his 1983 conspiracy and mail fraud convictions exceeded the 180-day maximum. See Pet. App. A3.[6]

3. Petitioner filed an appeal to the Board of Immigration Appeals, which dismissed the appeal in a decision issued on July 26, 1991. Pet. App. B1-B15. The Board affirmed the immigration judge's finding that petitioner is deportable, *id.* at B5-B9, emphasizing that "[t]he regulations did not provide in either 1977 or 1978, that a visitor could be admitted, for business or pleasure, for an indeterminate amount of time," *id.* at B7-B8.

The Board also affirmed the immigration judge's denial of petitioner's application for suspension of deportation.

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[6] The immigration judge likewise denied petitioner's request for voluntary departure under 8 U.S.C. 1254(e), because he did not satisfy the statutory requirement of "good moral character."

The Board agreed with the immigration judge's determination that petitioner was statutorily precluded from satisfying the "good moral character" prerequisite, Pet. App. B11-B12, and reasoned that petitioner is statutorily ineligible for suspension of deportation for the additional reason that he failed to establish extreme hardship, *id.* at B12-B14. Finally, the Board concluded that even if petitioner were statutorily eligible for suspension of deportation, it would deny relief in the exercise of its discretion because of petitioner's conspiracy and mail fraud convictions and the fact that there were outstanding arrest warrants for petitioner in Canada on charges of theft and fraud. *Id.* at B14-B15.[7]

4. On or about August 21, 1991, petitioner filed a motion with the Board captioned "Motion to Reopen and/or to Reconsider Its Decision; Appeal to the Board of Immigration Appeals." A.R. 10. In the motion, petitioner requested that the Board "reopen its hearing, and/or reconsider its decision," based on four enumerated grounds. *Id.* at 11. First, petitioner claimed that the Board did not "fully address the correctness and adequacy of the 'order to show cause' as previously submitted by [petitioner] in his appeal to th[e] Board," and he requested that one of the cases cited by the Board " 'be read' in his favor." *Id.* at 11-12. Petitioner described his second ground as "repeat[ing] his argument number 4 as contained on page 11 of his original appeal to [the] Board," in which he claimed that the 1977 and 1978 regulations and conditions imposed on Canadians entering the United States were invalid. *Id.* at 12. Petitioner's third and fourth grounds for reconsideration consisted of citations to two Board deci-

[7] The Board rejected or dismissed other challenges raised by petitioner that are not relevant to the issue presented for review. See Pet. App. B9-B11.

sions, both more than ten years' old and neither relevant to his case. *Id.* at 13.[8]

The Board denied petitioner's motion in an order dated February 3, 1993. Pet. App. B16-B19. The Board explained that petitioner's motion

> presented no new precedent decisions which have any bearing on our prior decision in this case nor has [h]e submitted any legal authorities which the Board may have inadvertently overlooked. Moreover, both of [petitioner's] assertions in his motion to reconsider were adequately addressed by the Board in its July 26, 1991, decision. Accordingly, we will deny the motion as frivolous.

Id. at B18.

5. Petitioner filed a petition for review in the court of appeals on March 25, 1993.[9] The court of appeals dis-

[8] Although petitioner's motion was captioned a "Motion to Reopen and/or to Reconsider Its Decision," A.R. 10, the Board and the court of appeals treated the motion solely as one to reconsider. Under the regulations authorizing such motions, the standards for the two motions differ:

> Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material. Motions to reconsider shall state the reasons upon which the motion is based and shall be supported by such precedent decisions as are pertinent.

8 C.F.R. 3.8(a).

[9] The court of appeals' opinion and the certiorari petition both state that the petition for review was filed in the court of appeals on March 25, 1993. Pet. App. A4; Pet. 6. The court of appeals' docket sheet indicates, however, that petitioner's opening brief was filed on that date and that the petition for review was filed on February 16, 1993. Resolution of that discrepancy is unnecessary for purposes of this case, because both dates are more than 90 days after the Board's July 26, 1991, final deportation order and less than 90 days after the Board's February, 3, 1993, denial of petitioner's motion for recon-

missed the petition in part and denied it in part. Pet. App. A1-A11.

a. The court of appeals dismissed the petition for want of jurisdiction to the extent it sought review of the Board's July 26, 1991, deportation order. The court explained that under 8 U.S.C. 1105a(a)(1) (Supp. IV 1992), a petition for judicial review of a final deportation order must be filed within 90 days of the date of the order. It noted that when the Board dismissed petitioner's appeal on July 26, 1991, the deportation order became final under 8 C.F.R. 243.1, which provides that "an order of deportation * * * shall become final upon dismissal of an appeal by the Board." Pet. App. A4-A5. Petitioner, however, did not file a petition for judicial review until March 25, 1993. The court held that petitioner's filing of a motion to reconsider by the Board in August, 1991, although it was within the 90-day period to file a petition for judicial review, did not postpone the time for seeking judicial review. *Id.* at A9.

In reaching that conclusion, the court of appeals reviewed the circumstances of the 1961 enactment of Section 106 of the INA, 8 U.S.C. 1105a. See Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 651. The court noted that the "fundamental purpose" of the new Section 1105a was to abbreviate the process of judicial review of deportation orders, so as to "frustrate certain practices * * * whereby persons subject to deportation were forestalling departure by dilatory tactics in the courts." Pet. App. A4-A5 (quoting *Foti* v. *INS*, 375 U.S. 217, 224 (1963)).

The court noted that prior to 1990, a split of authority had developed among the courts of appeals regarding whether the time for seeking judicial review under Section

sideration. To avoid confusion, we, like the court of appeals and petitioner, shall use the date of March 25, 1993.

1105a(a) is extended by the filing of a motion with the Board to reopen or reconsider. After analyzing the conflicting rulings of the Third and Ninth Circuits,[10] the court below acknowledged that both approaches were intended to implement Congress's intent to expedite the review process; it concluded, however, that "given the way in which the system works in practice the Ninth Circuit approach seems more conducive to dilatory tactics than does the Third Circuit approach." Pet. App. A7. The court of appeals explained that "[g]iven the measured pace at which the I.N.S. often operates, the filing of a motion for reconsideration may, under the Ninth Circuit approach, mean that the day of judgment in the court of appeals—and actual deportation—will not arrive until months or years later than would otherwise have been the case." *Ibid.*

Ultimately, the court of appeals concluded that "[w]hatever the law may have been previously, we do not believe that the Ninth Circuit approach is consistent with the statute as amended in 1990." Pet. App. A8. The court pointed out that not only did the 1990 amendments cut in

[10] The court noted that in *Nocon* v. *INS*, 789 F.2d 1028, 1033 (1986), the Third Circuit held that the filing of a motion to reopen or reconsider does not suspend the statutory time limit for seeking judicial review because such an interpretation would defeat the statutory purpose of preventing undue delay in deportation once the alien's status is determined. Pet. App. A5. By contrast, in *Bregman* v. *INS*, 351 F.2d 401 (1965), the Ninth Circuit held that if a motion to reopen is filed with the Board within the statutory period for filing a petition for judicial review—and if the petition for review is subsequently filed within the statutory period after denial of the motion to reopen—the court of appeals has jurisdiction to review both Board orders. Pet. App. A6-A7 & n.4 (also citing *Hyun Joon Chung* v. *INS*, 720 F.2d 1471 (9th Cir. 1983), cert. denied, 467 U.S. 1216 (1984); *Attoh* v. *INS*, 606 F.2d 1273 (D.C. Cir. 1979); *Pierre* v. *INS*, 932 F.2d 418 (5th Cir. 1991); and *Fleary* v. *INS*, 950 F.2d 711 (11th Cir. 1992), "all of which stem from the Ninth Circuit's decision in *Bregman*").

half the time period for seeking judicial review, they also added a provision requiring that any judicial review of a denial of a motion to reopen or reconsider shall be consolidated with the judicial review of the final deportation order. Pet. App. A8; see 8 U.S.C. 1105a(a)(6) (Supp. IV 1992), as enacted by the Immigration Act of 1990, Pub. L. No. 101-649, § 545(b)(3), 104 Stat. 5065. In the court's view, the consolidation provision would make no sense unless separate petitions for judicial review could be filed: "If Congress had intended to provide for a single petition for review covering both the original deportation order and the subsequent denial of a motion for reconsideration, there would not be two review proceedings to consolidate." Pet. App. A8. Noting that some courts of appeals have rejected this position even after the 1990 amendments,[11] the court below agreed with the approach taken by the Third and Seventh Circuits and held that petitioner's deportation order was final when the Board issued it on July 26, 1991, and "remained a final order notwithstanding [petitioner's] subsequent filing of a motion for reconsideration." *Id.* at A9. Thus, the petition filed on March 25, 1993, for judicial review of the July 26, 1991, deportation order was out of time, and the court of appeals did not have jurisdiction to review that order.[12]

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[11] The court contrasted the reasoning of the Eleventh Circuit in *Fleary* v. *INS*, 950 F.2d 711 (1992) (which followed the Ninth Circuit's pre-1990 position), with the Seventh Circuit's reasoning in *Akrap* v. *INS*, 966 F.2d 267, 271 (1992) (which concluded that the 1990 enactment of the statutory provision for consolidation of petitions for judicial review "has put to rest" the earlier conflict between the Third and Ninth Circuits, and requires the conclusion that the filing of a motion for reconsideration does not postpone the time for filing a petition for judicial review).

[12] The court of appeals rejected petitioner's contention that the government should be estopped from relying on the jurisdictional bar because petitioner allegedly received erroneous advice from government employees regarding the procedure for seeking judicial review. Pet. App. A9-A10. The court pointed out that petitioner was trained as a lawyer and concluded that, in any event, petitioner had not established any "affirmative misconduct" by the government, which would be required to invoke estoppel. *Id.* at A10. The court also stated that it would have been obliged to raise the jurisdictional bar *sua sponte*, even if the government were estopped from raising it, because a court is prohibited by Federal Rule of Appellate Procedure 26(b) from enlarging the time for filing a petition for review. Pet. App. A10.

b. To the extent petitioner sought judicial review of the Board's February 3, 1993, order denying his motion for reconsideration, the court of appeals exercised jurisdiction because the petition for review had been filed within 90 days of that order. On the merits, however, the court of appeals "fully agree[d] with the Board's characterization of the motion as 'frivolous,'" and it therefore held that the Board did not abuse its discretion in denying the motion for reconsideration. Pet. App. A11.[13]

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[13] Whether the court of appeals properly reached the merits of the Board's denial of the motion for reconsideration is a question not presented in this case. In *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987), however, the Court held that the ICC's denial of a motion to reconsider was not reviewable by the court of appeals because it alleged only material errors in the ICC's earlier disposition and did not allege any new evidence or changed circumstances. The granting or denial of such a motion, the Court reasoned, is committed to agency discretion and therefore is unreviewable under the Administrative Procedure Act, 5 U.S.C. 701(a)(2), and the Administrative Orders Review Act (Hobbs Act), 28 U.S.C. 2341 *et seq.* 482 U.S. at 277-284.

The court below relied on *Giova* v. *Rosenberg*, 379 U.S. 18 (1964) (per curiam), to support its exercise of jurisdiction to review the denial of petitioner's motion to reopen or reconsider. See Pet. App. A10. The question whether the court of appeals had subject matter jurisdiction over the petition for review is distinct from the question whether

SUMMARY OF ARGUMENT

Congress has clearly stated that in order to invoke the jurisdiction of the court of appeals to review an order of deportation, an alien must file a petition for judicial review "not later than 90 days" after issuance of a "final deportation order." 8 U.S.C. 1105a(a)(1) (Supp. IV 1992). Under the regulations promulgated by the Attorney General, an order by the Board of Immigration Appeals (Board) dismissing an appeal of an order of deportation is a final order for purposes of Section 1105a(a)(1). The Attorney General's interpretation is reasonable and entitled to deference, and it is not inconsistent with the Immigration and Nationality Act (INA), as amended. Deference is especially due the Attorney General's interpretation in this case because the INA leaves undefined the term "final deportation order," and the INA grants the Attorney General the authority to establish regulations to implement the statutory scheme for deportation proceedings.

The text, structure, and background of the INA judicial review provisions reinforce the validity of the Attorney General's interpretation. There is nothing in the language of the INA requiring that the filing of a motion to reopen or reconsider postpones the statutory deadline for filing a petition for judicial review or renders a final deportation order "nonfinal."

Petitioner nonetheless contends that the Court should inject into immigration deportation proceedings the toll-

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judicial review of a particular issue (the denial of a motion to reconsider) is foreclosed because resolution of that issue is committed to agency discretion. Cf. *Air Courier Conference* v. *American Postal Workers Union*, 498 U.S. 517, 523 n.3 (1991). If the motion for reconsideration in this case is properly characterized as one alleging only legal or factual error in the original decision, and not one alleging new evidence or changed circumstances, the Board's denial of the motion would appear to be unreviewable under *Locomotive Engineers*.

ing doctrine adopted by the Court in *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270, 284-285 (1987). The rationale underlying the adoption of the tolling result in *Locomotive Engineers* does not require rejection of the Attorney General's approach. The Court stated in *Locomotive Engineers* that 5 U.S.C. 704 does not *prevent* the filing of a petition for reconsideration from rendering the order under reconsideration nonfinal. It did not hold that 5 U.S.C. 704 *requires* that a motion for reconsideration be given that effect under all statutory schemes. The unique circumstances presented by orders of deportation counsel against expansion of the *Locomotive Engineers* rationale to override the Attorney General's regulatory implementation of the INA. Congress's "fundamental purpose" in enacting the judicial review procedures in the INA was to "abbreviate the process of judicial review of deportation orders in order to frustrate certain practices * * * whereby persons subject to deportation were forestalling departure by dilatory tactics in the courts." *Foti* v. *INS*, 375 U.S. 217, 224 (1963). The Court has recognized that in a deportation case, "as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *INS* v. *Doherty*, 112 S. Ct. 719, 724-725 (1992); *INS* v. *Rios-Pineda*, 471 U.S. 444, 450 (1985). The framework for judicial review crafted by Congress to minimize such delays in deportation cases should not be undermined by this Court's creation of a tolling exception.

ARGUMENT

AN ALIEN'S FILING OF A MOTION TO REOPEN OR RECONSIDER A FINAL DEPORTATION ORDER DOES NOT POSTPONE THE RUNNING OF THE 90-DAY PERIOD FOR SEEKING JUDICIAL REVIEW OF THE ORDER

A. The Attorney General's Regulatory Definition Of What Constitutes A Final Deportation Order Is Reasonable And Entitled To Great Deference

1. Section 106 of the Immigration and Nationality Act, 8 U.S.C. 1105a (1988 & Supp. IV 1992), establishes

"the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or comparable provisions of any prior Act." 8 U.S.C. 1105a(a) (Supp. IV 1992). As part of that "exclusive procedure," Section 1105a(a)(1) imposes a strict time limitation on seeking judicial review. As amended in 1990, it provides:

> **(1) Time for filing petition**
>
> a petition for review may be filed not later than 90 days after the date of the issuance of the final deportation order, or, in the case of an alien convicted of an aggravated felony,[14] not later than 30 days after the issuance of such order.

8 U.S.C. 1105a(a)(1) (Supp. IV 1992).[15]

The INA does not define "final deportation order," which triggers the running of the 90-day period for seeking judicial review. Immediately after Section 1105a was enacted in 1961, however, the Attorney General filled the statutory gap by promulgating a regulation to define that term. The regulation specified, in relevant part:

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[14] The term "aggravated felony" includes murder, drug trafficking, trafficking in firearms, certain offenses relating to money laundering, and crimes of violence for which the term of imprisonment imposed is at least five years. 8 U.S.C. 1101(a)(43) (Supp. IV 1992).

[15] At the time of its enactment in 1961, Section 1105a(a)(1) provided in relevant part that a petition was to be filed "not later than six months from the date of the final deportation order or from the effective date of this section, whichever is the later." Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 651. The 90-day time period applies to petitioner's case because his final deportation order was entered on July 26, 1991, and the 1990 amendment applies to all final orders entered on or after January 1, 1991. Immigration Act of 1990, Pub. L. No. 101-649, § 545(g)(4), 104 Stat. 5067.

> **Final order of deportation.**
>
> [A]n order of deportation * * * shall become final upon dismissal of an appeal by the Board of Immigration Appeals, upon waiver of appeal, or upon expiration of the time allotted for an appeal when no appeal is taken.

26 Fed. Reg. 12,113 (1961); see 8 C.F.R. 243.1 (1962). The introduction to the rule explained that Section 243.1 "is new and is being added to show when an order of deportation becomes final." 26 Fed. Reg. 12,111 (1961). The regulation has remained in effect since 1961, see 8 C.F.R. 243.1 (1994), and although Congress has since amended the relevant statutory provisions, it has not modified the Attorney General's definition during the intervening 33 years.

The Attorney General's regulations have also long made clear that motions to reopen or reconsider do not affect the finality of a Board order dismissing an appeal. Even prior to the enactment of Section 1105a in 1961, the regulations specified that "[t]he decision of the Board shall be final," 17 Fed. Reg. 11,475 (1952), originally codified at 8 C.F.R. 6.1(d)(2) (1953) (recodified at 8 C.F.R. 3.1(d)(2) (1959), see 23 Fed. Reg. 9117 (1958)), and that "[t]he filing of a motion to reopen or a motion to reconsider shall not serve to stay the execution of any decision made in the case," 17 Fed. Reg. 11,476, 11,478 (1952), originally codified at 8 C.F.R. 6.21(a) and 8.11(a) (1953) (recodified at 8 C.F.R. 3.8(a) (1959), see 23 Fed. Reg. 9118 (1958)).[16]

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[16] By contrast, the pre-1961 regulations made clear that an automatic stay of deportation was provided at the earlier stage of an administrative appeal to the Board. See 17 Fed. Reg. 11,476 (1952), originally codified at 8 C.F.R. 6.14 (1953) (recodified at 8 C.F.R. 3.6 (1959), see 23 Fed. Reg. 9118 (1958)). That regulation is now codified

The regulation specifying that deportation is not stayed pending disposition of a motion to reopen or reconsider—which has remained in effect ever since 1952, 8 C.F.R. 3.8(a) (1994)—confirms the full import of the regulation that specifies when an order of deportation becomes "final." Finality is "concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Darby* v. *Cisneros*, 113 S. Ct. 2539, 2543 (1993) (quoting *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 193 (1985)). By not providing for an automatic stay pending the Board's disposition of a motion to reopen or reconsider, the filing of such a motion does not alleviate the consequences of the order of deportation, and therefore does not render it "nonfinal." See

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at 8 C.F.R. 3.6(a), and is accompanied by a modification added in 1971 that specifies that the provision for an automatic stay pending administrative appeal does *not* apply to an administrative officer's denial of a motion to reopen or reconsider or to stay deportation, except where the administrative officer granted a stay pending appeal. The Board, however, may stay the deportation, in its discretion, in such circumstances. 8 C.F.R. 3.6(b); see 36 Fed. Reg. 316 (1971). In addition, when a motion to reopen or reconsider is filed with the immigration judge in a deportation proceeding, the execution of an outstanding deportation order is not automatically stayed. 8 C.F.R. 242.22.

The pre-1961 regulations were promulgated soon after the enactment of the INA, Act of June 27, 1952, ch. 477, 66 Stat. 163. 17 Fed. Reg. 11,469 (1952). In certain respects, the pre-1961 regulations constituted modifications and recodifications of regulations that predated the 1952 enactment of the INA and implemented the Immigration Act of 1917. Those regulations provided that a deportation order was automatically stayed pending administrative appeal to the Board, see 8 C.F.R. 90.9(b) (1949) ("Filing of an appeal shall operate to stay the execution of the * * * order until action on the appeal has been completed."), but made the issuance of a stay pending disposition of a motion to reopen or reconsider discretionary, see, *e.g.*, 8 C.F.R. 90.10, 90.11 (1949).

8 U.S.C. 1252(c) (Attorney General may effect alien's deportation "[w]hen a final order of deportation under administrative processes is made").[17]

Other aspects of the regulatory scheme reinforce the common sense of the Attorney General's approach to finality. Since shortly after the enactment of Section 1105a in 1961, the regulations have provided that "[m]otions to reopen in deportation proceedings shall not be granted" unless the Board finds certain listed criteria to be met (8 C.F.R. 3.2; see 27 Fed. Reg. 97 (1962)). The granting of a motion to reopen is discretionary, and such motions are disfavored in immigration proceedings. *INS* v. *Doherty*, 112 S. Ct. 719, 724 (1992); *INS* v. *Abudu*, 485 U.S. 94, 107-108 (1988). "This is especially true in a deportation proceeding where, as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *INS* v. *Doherty*, 112 S. Ct. at 724-725. Because motions to reopen or reconsider are to be granted only rarely by the Board, the strong public interest that weighs against delay also weighs against postponing the statutory deadline for seeking judicial review simply because a motion to reopen or reconsider has been filed. Furthermore, since 1962, the regulations have required motions to reopen or reconsider to state whether "the validity of the deportation order has been or is the subject of any judicial proceeding," and the status of any such proceeding (8 C.F.R. 3.8(a); see 27 Fed. Reg. 7488 (1962))—thereby recognizing that judicial review may proceed notwithstanding the filing of the motion. See *Nocon* v. *INS*, 789 F.2d 1028, 1033 n.5 (3d Cir. 1986) (noting that 8 C.F.R. 3.8(a) "appears to assume the continuing appealability of the original deportation order" notwithstanding the filing of a motion to reopen or reconsider).

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[17] The finality of the Board's order is underscored by the fact that if the alien is deported notwithstanding the filing of a motion to reopen or reconsider (as the regulations allow), the alien thereafter has no recourse to the courts to challenge the order. See 8 U.S.C. 1105a(c); *White* v. *INS*, 6 F.3d 1312, 1316-1317 (8th Cir. 1993).

2. The Attorney General's implementation of the INA in these respects, particularly her specification of what constitutes a final deportation order, is entitled to substantial deference. The Attorney General is charged with "the administration and enforcement" of the INA and "all other laws relating to the immigration and naturalization of aliens," with certain exceptions for laws relating to the powers of other government officials, see *Sale* v. *Haitian Centers Council, Inc.*, 113 S. Ct. 2549, 2559 (1993)—"[p]rovided, however, [t]hat determination and ruling by the Attorney General with respect to all questions of law shall be controlling." 8 U.S.C. 1103(a). The Attorney General further is charged with establishing "such regulations * * * as [s]he deems necessary for carrying out [her] authority under the provisions of [the INA]." *Ibid.*; see also 8 U.S.C. 1252(b) (deportation proceedings shall be conducted "in accordance with such regulations, not inconsistent with [the INA], as the Attorney General shall prescribe," and "the decision of the Attorney General shall be final").

In light of these express delegations of authority, the Attorney General's regulations implementing the statutory scheme for determining the deportability of aliens and effecting their deportation may be set aside only if they are arbitrary, capricious, or manifestly contrary to the INA. *Sullivan* v. *Zebley*, 493 U.S. 521, 528 (1990) (quoting *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984)). As the Court has explained:

> In administering this country's immigration laws, the Attorney General and the INS confront an onerous task even without the addition of judicially augmented incentives to take meritless appeals, engage in repeated violations, and undertake other conduct solely to drag out the deportation process. * * * The

> Act commits the definition of the standards in the Act to the Attorney General and [her] delegate in the first instance, "and their construction and application of th[ese] standard[s] should not be overturned by a reviewing court simply because it may prefer another interpretation of the statute."

INS v. *Rios-Pineda*, 471 U.S. 444, 450-451 (1985) (quoting *INS* v. *Jong Ha Wang*, 450 U.S. 139, 144 (1981) (per curiam)). Where the Attorney General necessarily promulgates rules to fill a " 'gap left, implicitly or explicitly, by Congress,' the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 448 (1987) (quoting *Chevron*, 467 U.S. at 843, and *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974)).

In *Weinberger* v. *Salfi*, 422 U.S. 749, 766 (1975), this Court held that where, as here, an Act of Congress does not specify when agency action is "final" for purposes of judicial review, but does confer on the agency concerned the authority to promulgate regulations to implement the Act, the agency may properly prescribe by regulation when agency action becomes final for those purposes.[18]

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[18] The Court also explained in *Weinberger* v. *Salfi* that a "final" administrative decision is a "statutorily specified jurisdictional prerequisite" for judicial review under the Social Security Act, 42 U.S.C. 405(g), even though it is "not precisely analogous to the more classical jurisdictional requirements contained in such sections of Title 28 as 1331 and 1332." 422 U.S. at 766. The court of appeals in the instant case similarly emphasized the jurisdictional nature of its ruling (Pet. App. A9), noting that it was "mindful of the Supreme Court's admonition in *Cheng Fan Kwok* v. *I.N.S.*, 392 U.S. 206, 212 (1968)":

> Section 106(a) [8 U.S.C. § 1105a(a)] is intended exclusively to prescribe and regulate a portion of the jurisdiction of the federal courts. As a jurisdictional statute, it must be construed both with

The Court has previously applied the same principle under the INA, twice holding that regulations issued by the Attorney General to govern the conduct of deportation proceedings may properly give content to the term "final deportation order" in Section 1105a, and thereby determine the scope of judicial review under that provision. See *Foti* v. *INS*, 375 U.S. 217, 229-230 & n.16, 232 (1963) ("[c]learly, changes in administrative procedures may affect the scope and content of various types of agency orders and thus the subject matter embraced in a judicial proceeding to review such orders"); *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 214, 216-217 & n.17 (1968).

The Attorney General has invoked the same authority in the present context, specifying that the Board of Immigration Appeals' dismissal of an appeal constitutes and

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precision and with fidelity to the terms by which Congress has expressed its wishes.

In other contexts as well, the courts of appeals have recognized that Section 1105a(a)(1) is jurisdictional in nature, that the statutory deadline is not subject to equitable tolling, and that it cannot be suspended without running afoul of Federal Rule of Appellate Procedure 26(b), which expressly prohibits courts from enlarging the time within which petitions for review must be filed. See, *e.g.*, *Karimian-Kaklaki* v. *INS*, 997 F.2d 108, 111-112 (5th Cir. 1993) (court without jurisdiction to review petition that although mailed two days prior to expiration of 90-day period following Board's issuance of final deportation order, was received by court on 92d day; tolling of 90-day period inappropriate because timely petition is jurisdictional requirement and Fed. R. App. P. 26(b) prohibits court from enlarging time periods for filing petitions for judicial review); *Stajic* v. *INS*, 961 F.2d 403, 404 (2d Cir. 1992) (per curiam) (timely filed petition is jurisdictional prerequisite to judicial review); *Amaral* v. *INS*, 977 F.2d 33, 35 (1st Cir. 1992); *Te Kuei Liu* v. *INS*, 645 F.2d 279, 282-283 (5th Cir. 1981) (review powers of court limited by statutory time limit); *Lee* v. *INS*, 685 F.2d 343, 343 (9th Cir. 1982) (per curiam) (dismissing petition for review filed after the "mandatory and jurisdictional" time limit of Section 1105a(a)(1)).

remains a final deportation order, notwithstanding the alien's subsequent filing of a motion to reopen or reconsider. It is especially appropriate for the Attorney General to determine the consequences of such a motion, because "[t]here is no statutory provision for reopening of a deportation proceeding, and the authority for such motions derive[s] solely from regulations promulgated by the Attorney General." *INS* v. *Doherty*, 112 S. Ct. at 724;[19] compare *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270, 277-278 (1987) (discussing statutory provision for reopening and reconsideration of ICC orders). The Attorney General's determination therefore must be sustained unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Sullivan* v. *Zebley*, 493 U.S. at 528 (quoting *Chevron*, 467 U.S. at 844).

The Attorney General's approach to the finality issue in this context plainly is not arbitrary or capricious; it represents an entirely reasonable implementation of the INA, by balancing the need for finality and expedition in deportation proceedings against the interest in providing a safety valve to remedy defects in exceptional cases. And, as we explain in Part B below, far from being "manifestly contrary" to the INA, the Attorney General's approach is reinforced by the text, structure, and background of that Act. The INA is not so rigid as to afford the Attorney General the discretion to provide for reopening or reconsideration of final deportation orders only at the cost of undoing the finality of those orders.

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[19] Indeed, the Board of Immigration Appeals is entirely a creature of the Attorney General's regulations. See 8 C.F.R. 3.1.

B. The Text, Structure, And Background Of The Immigration And Nationality Act Reinforce The Attorney General's Approach To Finality In This Setting

1. *The 1961 Enactment of 8 U.S.C. 1105a*

When Congress first enacted the INA in 1952, it did not include special statutory procedures for judicial review of deportation orders. This Court subsequently held, however, that judicial review of deportation orders imposed under the INA was governed by the general provisions of the Administrative Procedure Act. Act of June 11, 1946, ch. 324, § 10, 60 Stat. 243 (APA). See *Shaughnessy* v. *Pedreiro,* 349 U.S. 48 (1955) (holding that APA provisions making available district court action for declaratory and injunctive relief applied under 1952 INA, and that habeas corpus proceeding was no longer sole means of challenging deportation order).

By 1961, however, Congress was disturbed by meritless actions in deportation cases "brought solely for the purpose of preventing or delaying indefinitely [the alien's] deportation from this country." H.R. Rep. No. 1086, 87th Cong., 1st Sess. 23 (1961). In an effort to curtail delaying tactics, Congress abandoned the APA's general procedure for judicial review and instead incorporated into the INA the procedures for judicial review set forth in the Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.*, popularly known as the Hobbs Act.[20] See Act of Sept. 26,

[20] The Hobbs Act was enacted in 1950 to govern judicial review of orders of certain specified agencies, such as the Federal Communications Commission, the Secretary of Agriculture, and the United States Maritime Commission. See Act of Dec. 29, 1950, ch. 1189, 64 Stat. 1129. It was patterned after the procedures established for judicial review of Federal Trade Commission orders and adopted for judicial review of orders issued by the Securities and Exchange Commission, the Bituminous Coal Commission, and the National Labor Relations Board. See S. Rep. No. 2618, 81st Cong., 2d Sess. 4 (1950). In enacting the Hobbs Act, Congress believed that the new procedures that gave courts of appeals jurisdiction to review cases based on the administrative record (rather than conferring jurisdiction on three-judge courts empowered to conduct evidentiary hearings) would "make for economy and expedition" in the disposition of cases in federal courts. *Id.* at 5.

The Hobbs Act was originally codified at 5 U.S.C. 1031 *et seq.* (Supp. IV 1950), following the APA. In 1966, however, the Hobbs Act was moved from Title 5 to its current location in Title 28 of the United States Code. See Act of Sept. 6, 1966, Pub. L. No. 89-554, § 4(e), 80 Stat. 621-625. The Hobbs Act accordingly is now referenced in 8 U.S.C. 1105a(a) (Supp. IV 1992) as "the provisions of chapter 158 of title 28."

1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 651. That incorporation was contained in a new Section 106 of the INA, codified at 8 U.S.C. 1105a (1988 & Supp. IV 1992). The purpose of the new section was "to create a single, separate, statutory form of judicial review of administrative orders for the deportation and exclusion of aliens from the United States," so as to expedite judicial review and limit the duration of deportation proceedings. H.R. Rep. No. 1086, *supra,* at 22-23; see *Foti* v. *INS,* 375 U.S. at 224.

Congress did not incorporate the Hobbs Act's procedural scheme in its entirety for deportation cases, however, because it concluded that "certain specified exceptions" were "made necessary by the unique subject matter of the proposal." H.R. Rep. No. 1086, *supra,* at 22. The first of those exceptions—Section 1105a(a)(1)—established the deadline for filing a petition for judicial review. That provision stated that a petition for review may be filed "not later than" six months (now 90 days) from the "final deportation order." The Hobbs Act, by contrast, states that upon entry of a final order reviewable under the Act, a party "may, within 60 days after its entry, file a petition to review the order in the court of appeals." 28 U.S.C. 2344. Congress's

departure from that more permissive language of the Hobbs Act in favor of the phrase "not later than" in Section 1105a(a)(1) suggests an intent to impose a filing deadline that is fixed immediately upon "issuance" of the "final deportation order." It therefore cuts against the notion that the running of the 90-day period must be tolled or postponed if a motion to reopen or reconsider is subsequently filed with the Board.[21]

The framework for staying deportation orders established by the 1961 legislation bolsters the reasonableness of the Attorney General's judgment regarding administrative finality. Congress specified that the new judicial review provision was not to be construed "to require the Attorney General to defer deportation of an alien after the issuance of a deportation order because of the right of judicial review of the order granted by this section." 8 U.S.C. 1105a(a)(8) (Supp. IV 1992) (codified in 1961 at 8 U.S.C. 1105a(a)(7) (Supp. III 1961)). In the event that an alien properly pursued his right to judicial review, however, Congress further provided that service of the petition "shall stay the deportation of the alien pending determination of the petition by the court, unless the court otherwise directs." 8 U.S.C. 1105a(a)(3) (Supp. IV 1992).[22] At the

[21] This conclusion is not undermined by the fact that Congress provided a six-month period for seeking judicial review under the INA, rather than the 60-day period under the Hobbs Act. Congress could reasonably have determined that because it established a fixed cut-off time, it could be more generous in the total time allotted without unduly compromising its ultimate aim to place a limit on the length of deportation proceedings, especially since a reopening or reconsideration motion might be filed and disposed of during the extended period. See *Nocon* v. *INS*, 789 F.2d at 1033 (citing H.R. Rep. No. 1086, *supra*, at 22-23, 29-30); *Alleyne* v. *INS*, 879 F.2d 1177, 1181 n.7 (3d Cir. 1989).

[22] As amended in 1990, the automatic stay upon service of the petition for review does not apply if the alien has been convicted of an aggravated felony. See 8 U.S.C. 1105a(a)(3) (Supp. IV 1992).

same time, Congress did not disturb the longstanding rule under the governing regulations that a motion to reopen or reconsider does *not* stay the execution of a final deportation order. See pages 15, 16, *supra*. Congress's omission of any statutory provision for an automatic stay in those circumstances, coupled with its provision for such a stay only after a petition for judicial review has been filed, reflects an intent to suspend the operative effect of the final deportation order only in the latter situation. The Act thereby creates a framework for prompt judicial review. As the Eighth Circuit reasoned in *White* v. *INS*, 6 F.3d 1312, 1317 (1993): "The automatic stay of execution of a final order of deportation that accompanies a petition for review, considered by Congress important enough to be mandatory in immigration law, is corrupted by the scenario of suspended finality" upon the alien's mere filing of a motion to reopen or reconsider with the Board.

2. *The 1990 Amendments*

Any doubt concerning the validity of the Attorney General's determination that a motion to reopen or reconsider does not render a final deportation order nonfinal (and therefore does not suspend the period within which judicial review must be sought) was "put to rest" by Congress in 1990. See Pet. App. A8 (quoting *Akrap* v. *INS*, 966 F.2d 267, 271 (7th Cir. 1992)).[23]

[23] The question presented in this case was noted in *Woodby* v. *INS*, 385 U.S. 276, 286 n.20 (1966). In that case, the INS argued in the court of appeals that judicial review was limited to determining whether the Board's denial of the alien's motion for reconsideration was an abuse of discretion, because the petition for judicial review was filed more than six months after the issuance of the order of deportation (although within six months after the denial of the motion for reconsideration). The court of appeals concluded that it "need not decide this suggested limitation upon [its] review powers because * * *

a. First, Congress added a new paragraph (6) to Section 1105a(a), directing that "whenever a petitioner seeks

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[it was] persuaded that the Board orders must be affirmed on either ground." *Woodby* v. *INS*, 370 F.2d 989, 992 (6th Cir. 1965). After the court of appeals' decision in *Woodby*, the Ninth Circuit held in *Bregman* v. *INS*, 351 F.2d 401 (1965), that in such a situation it had jurisdiction to review the deportation order as well as the denial of the motion to reconsider.

The government's subsequently filed brief in this Court in the *Woodby* case abandoned the contention made in the court of appeals, in light of *Bregman*. 66-40 Gov't Br. at 8 n.3. In its opinion in *Woodby*, the Court noted that the court of appeals had not passed on the question and that the government had since abandoned its contention. 385 U.S. at 286 n.20. The dissent stressed the importance of the issue which the majority had "ignore[d]." 385 U.S. at 291 (Clark, J., joined by Harlan, J.). It reasoned that the legislative history of Section 1105a "makes it clear that Congress intended it to be strictly enforced * * *. Since there is no time limit on petitions for rehearing or reconsideration, permitting review of a final order of deportation merely because a timely petition for review of an administrative refusal to reopen the proceedings has been filed would negate the congressional purpose behind the insistence on timely filing" in Section 1105a. *Ibid.* (citations omitted).

In the years prior to and shortly after the *Woodby* case, the issue appears to have arisen mainly in cases in which the motion to reopen or reconsider had been filed after expiration of the six-month period for seeking judicial review. The courts universally rejected such belated attempts to obtain judicial review; the analyses by those courts, however, often indicated that they likewise would have rejected petitioner's approach, because their reasoning turned on whether the petition for judicial review was filed within six months of the entry of the deportation order, rather than on whether the motion to reopen or reconsider was filed within that time period, as petitioner urges. See, *e.g.*, *Chul Hi Kim* v. *INS*, 357 F.2d 904, 906 (7th Cir. 1966); *Gena* v. *INS*, 424 F.2d 227, 231 (5th Cir. 1970).

In *Santiago* v. *INS*, 526 F.2d 488, 489 n.3 (9th Cir. 1975) (en banc), cert. denied, 425 U.S. 971 (1976), the INS unsuccessfully argued against jurisdiction in a case similar to this one. See also *Hyun Joon Chung* v. *INS*, 720 F.2d 1471, 1473-1474 (9th Cir. 1983) (same), cert. denied, 467 U.S. 1216 (1984). After the Third Circuit adopted the INS's jurisdictional argument in *Nocon* v. *INS*, 789 F.2d 1028 (1986), the circuits remained split, as discussed by the court of appeals below, both before and after the 1990 amendments. See Pet. App. A4-A8.

review of an order under this section, any review sought with respect to a motion to reopen or reconsider such an order shall be consolidated with the review of the order." 8 U.S.C. 1105a(a)(6) (Supp. IV 1992); see Immigration Act of 1990, Pub. L. No. 101-649, § 545(b)(3), 104 Stat. 5065. This provision necessarily rests on the premise that a petition for judicial review of a deportation order may be filed separately from a petition for judicial review of the denial of a motion to reopen or reconsider.

Petitioner nevertheless suggests (Pet. Br. 38) that the provision for consolidation "is most easily given effect when the motion to reopen has already been decided at the time the petition for review is filed," and that "this situation is most easily enabled by permitting tolling." But in the scenario described by petitioner, only one petition for review would ordinarily be filed (as was true in petitioner's case), and there would be nothing to consolidate. See *Akrap* v. *INS*, 966 F.2d at 271 ("If the filing of a motion to reopen were to render any previous orders non-final, only one final order would exist—and what then would be subject to 'consolidation' * * * ?"). Section 1105a(a)(6) would thereby be rendered superfluous, "a disfavored result that should be avoided where possible." *Thomas Jefferson University* v. *Shalala*, 114 S. Ct. 2381, 2396 (1994); *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011, 1015-1016 (1992).

Moreover, under petitioner's theory, it would not merely be easier to "give[ ] effect" to the consolidation provision if the motion was decided before the alien petitioned for judicial review; that would be the only manner in which the deportation order could be reviewed, because the order would not again become final, under petitioner's theory, until the motion to reopen or reconsider was decided.[24]

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[24] Indeed, in some jurisdictions that have adopted petitioner's approach, the court will dismiss an alien's petition seeking judicial review of a final deportation order if the alien filed a motion to reopen

Again, in such a situation, "multiple reviewable orders would not exist to consolidate." *Bauge* v. *INS*, 7 F.3d 1540, 1542 (10th Cir. 1993); see also *White* v. *INS*, 6 F.3d at 1317.

Petitioner suggests another scenario in which the consolidation provision could apply under his interpretation. He asserts that if the alien files a petition for review before he files a motion to reopen, the court would have jurisdiction over the petition and would retain jurisdiction even after the motion was filed with the Board. See Pet. Br. 39 n.8 (citing *Ogio* v. *INS*, 2 F.3d 959, 960-961 (9th Cir. 1993)). That petition could later be consolidated with a petition seeking judicial review of the Board's denial of the motion to reopen. Neither petitioner nor the Ninth Circuit explains, however, why the filing of a petition before the motion instead of after makes a difference as to whether the motion renders the Board's order nonfinal for purposes of judicial reivew.[25] The court of appeals noted that

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or reconsider before he sought judicial review and that motion is still pending before the Board. Those courts reason that the final deportation order has been rendered "nonfinal" by the filing of the motion to reopen or reconsider, thus depriving the court of jurisdiction to review it. That approach has resulted in some aliens' being precluded from obtaining any judicial review of their deportation orders because, after the Board later denied the alien's motion, the alien did not file a second petition for review on the erroneous belief that the still-pending first petition had preserved the right of judicial review. See, *e.g.*, *Fleary* v. *INS*, 950 F.2d 711, 712-713 (11th Cir. 1992) (an alien's premature, "unripe appeal is not curable by subsequent agency action"). Cf. *Hallstrom* v. *Tillamook County*, 493 U.S. 20 (1989).

[25] Indeed, the Ninth Circuit's discussion of the issue in *Ogio* is dictum inasmuch as the motion for reconsideration in that case was filed before the petition for judicial review. The *Ogio* dictum rests on the Ninth Circuit's reasoning in *Berroteran-Melendez* v. *INS*, 955 F.2d 1251 (1992).

The court in *Berroteran-Melendez* was faced with a situation in which the alien had filed a petition for judicial review and then subsequently filed a motion to reopen or reconsider with the Board. The court of appeals concluded, without analysis, that it had jurisdiction over the petition notwithstanding the filing of the motion with the Board. The court then addressed the question whether it should grant the alien's motion to suspend the judicial proceeding pending the disposition of the motion before the Board. It acknowledged that "under Ninth Circuit law, there is no substantive difference between the filing of a motion to reopen *before* the petition for review, in which case the time for filing the petition runs from the date of the decision on the motion to reopen, and where a motion to reopen is filed *after* the petition for review and the appellate proceedings are suspended. The appellate process would not be further delayed." 955 F.2d at 1255. The court nonetheless declined to suspend the court proceedings and followed the approach taken by the Third Circuit in *Alleyne* v. *INS*, 879 F.2d 1177 (1989), which was contrary to Ninth Circuit authority on the tolling issue, but which demonstrated that suspending appellate proceedings pending Board disposition of a motion to reopen "would effectively create an automatic stay of deportation pending the outcome of a motion to reopen." 955 F.2d at 1255 (citing *Alleyne* v. *INS*, 879 F.2d at 1181 n.7). Such a result would be contrary to the longstanding regulations that provide that the filing of a motion to reopen or reconsider does not stay deportation. The Ninth Circuit also concluded in *Berroteran-Melendez* that while suspension of judicial proceedings would promote judicial efficiency, "the potential for abuse of the process to circumvent the [Board's] discretionary power to grant or deny a stay of deportation pending a motion to reopen outweighs concerns with efficiency." 955 F.2d at 1255; see also *Alleyne* v. *INS*, 879 F.2d at 1181 n.7. Thus, the approach suggested by petitioner and the Ninth Circuit does not eliminate the possibility of more than one judicial review proceeding.

"[t]his is admittedly a complicated state of affairs," but felt bound by circuit precedent "[g]iven the way [its] law has developed." 2 F.3d at 961 & n.1. This Court, however, is not similarly bound. There accordingly is no reason for this Court to adopt an interpretation of Section 1105a that would both require such a strained reading of the consolidation paragraph Congress added to that Section in 1990 and lead to such an "admittedly * * * complicated

state of affairs" as a practical matter—and that would rigidly confine the broad rulemaking authority conferred on the Attorney General by other provisions of the INA.

b. In 1990, Congress also directed the Attorney General to issue regulations regarding motions to reopen or reconsider, including regulations that (1) set a maximum time period for filing such motions, and (2) limit the number of such motions that may be filed. See Immigration Act of 1990, Pub. L. No. 101-649, § 545(d), 104 Stat. 5066.[26] The Conference Report expressed the view that unless the Attorney General "finds reasonable evidence to the contrary, the regulations should state that such motions be made within 20 days of the date of the *final* determination in the proceeding and that such motions be limited to one motion to reopen and one motion to reconsider." H.R. Conf. Rep. No. 955, 101st Cong., 2d Sess. 133 (1990) (emphasis added).[27] That statement manifests

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[26] Congress also directed the Attorney General to "report on abuses associated with the failure of aliens to consolidate requests for discretionary relief before immigration judges at the first hearing on the merits." Immigration Act of 1990, Pub. L. No. 101-649, § 545(c), 104 Stat. 5065-5066. Petitioner points to the resulting report (Attorney General's Report to Congress on Consolidation of Requests for Relief from Deportation, excerpted at Pet. Br. App.) to support his contention that there is not a significant problem of aliens' abusing the system to delay deportation. Pet. Br. 13-14, 31-32. The report does not, however, analyze abuses associated with motions for reopening or reconsideration by the Board. Rather, it focuses on the issues the Attorney General was directed by Congress to address—abuses at the first hearing on the merits before an immigration judge and abuses associated with the failure to consolidate requests for discretionary relief at that stage. Thus, the results of the survey and study cited by petitioner are not germane to the time limit for seeking judicial review, at issue here.

[27] The Attorney General also must "consider exceptions in the interest of justice" and for changed circumstances in asylum cases. H.R. Conf. Rep. No. 955, *supra*, at 133. The proposed rules for implementing the congressional directive were published on June 7, 1994. See 59 Fed. Reg. 29,386-29,391. The time for submission of written comments expired on August 8, 1994. The proposed rules provide, in relevant part, that a party may file only one motion to reopen proceedings and one motion to reconsider a decision of an immigration judge, the Board, or a service officer. A motion to reopen proceedings must be filed within 20 days of the final administrative decision. A motion to reconsider a decision must be filed within 20 days of the decision. A party may not seek reconsideration of a decision denying a previous motion to reconsider. An alien who has filed an asylum claim or sought withholding of deportation may move to reopen at any time where the claim is based upon an alleged change in circumstances in the country of the alien's nationality. See 59 Fed. Reg. 29,387-29,390 (1994).

an understanding that an order of deportation is final regardless of the subsequent filing of a motion to reopen or reconsider. At the same time, Congress shortened by half (from six months to 90 days generally, and from 60 to 30 days for aggravated felons) the deadline for filing a petition for judicial review, see Immigration Act of 1990, Pub. L. No. 101-649, §§ 502(a), 545(b)(1), 104 Stat. 5048, 5065, thereby strengthening the statutory policy of expedition in review of deportation orders.

If Congress in 1990 had intended that the Board's final order would be rendered nonfinal—and that judicial review would thereby be postponed—by the alien's mere filing of a motion to reopen or reconsider, it presumably would have stated as much in the course of providing for the shortening of *both* the deadline for filing such motions and the deadline for filing petitions for judicial review. Significantly, moreover, Congress once again declined to disturb the longstanding regulation providing that execution of a final deportation order is not stayed pending the disposition of a motion to reopen or reconsider.

c. In sum, when viewed against the 1990 amendments as well as the 1961 enactment, the Attorney General's interpretation and implementation of the INA's reference to "final deportation order" is "most consistent both with Congress' intentions and with the terms by which it has chosen to express those intentions." *Cheng Fan Kwok* v. *INS*, 392 U.S. at 218.

C. The Court's Decision In *ICC* v. *Brotherhood of Locomotive Engineers* Does Not Require A Different Result

Petitioner contends (Br. 12, 20, 42) that this Court's decision in *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270, 284-285 (1987), requires that the Attorney General's position be rejected. That case concerned judicial review of two rulings by the Interstate Commerce Commission (ICC)—(1) its denial of a petition requesting that it clarify prior decisions in a railroad proceeding, and (2) its denial of a petition requesting reconsideration of that denial. The Court principally addressed whether the ICC's denials of the petitions were judicially reviewable. *Id.* at 277-284, 285-287; see note 13, *supra*.

In the course of its analysis, however, the Court also held that the filing of the petition with the ICC for reconsideration of its earlier order stayed the running of the 60-day period under the Hobbs Act for seeking judicial review of that earlier order until the ICC acted on the motion for reconsideration. 482 U.S. at 284-285. In reaching that conclusion, the Court acknowledged that "[a] contrary conclusion is admittedly suggested by the language of the Hobbs Act and of 49 U.S.C. § 10327(i), which provides that, '[n]othwithstanding' the provision authorizing the Commission to reopen and reconsider its orders (§ 10327(g)), 'an action of the Commission * * * is final on the date on which it is served, and a civil action to enforce, enjoin, suspend, or set aside the action may be filed after that date.' " 482 U.S. at 284 (quoting 49 U.S.C. 10327(i)). "This would seem to mean," the Court continued, "that the pendency of reconsideration motions does not render Commission orders nonfinal for purposes of triggering the Hobbs Act limitations period." 482 U.S. at 284. The Court noted, however, that the same argument could be made with respect to the similar provision of the APA, 5 U.S.C. 704, but that the APA provision has been construed "merely to relieve parties from the *requirement* of petitioning for rehearing before seeking judicial review * * *, but not to prevent petitions for reconsideration that are actually filed from rendering the orders under reconsideration nonfinal." 482 U.S. at 284-285. The Court stated that it could "find no basis for distinguishing the language of [49 U.S.C.] § 10327(i) from that of [5 U.S.C.] § 704." *Id.* at 285.

The Court's discussion of the specific tolling issue presented in *Locomotive Engineers* under the ICC statute does not lead to the conclusion that the Attorney General's regulatory implementation of the INA is invalid.[28] As relevant here, the Court stated only that 5 U.S.C. 704 has been construed "not to *prevent* petitions for reconsideration that are actually filed from rendering the orders under reconsideration nonfinal." 482 U.S. at 285 (emphasis added). Our argument in this case is not that 5 U.S.C. 704 prevents a motion for reopening or reconsideration of a deportation order from rendering the order nonfinal. Rather, it is that the INA confers on the Attorney General the authority to determine what constitutes a "final deportation order" within the meaning of the particular provision of the INA that governs judicial review of such orders.

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[28] See *White* v. *INS*, 6 F.3d at 1314-1317 (distinguishing *Locomotive Engineers*); *Alleyne* v. *INS*, 879 F.2d at 1180-1182 & n.7 (same).

The Court did not hold in *Locomotive Engineers* that 5 U.S.C. 704 overrides such an exercise of rulemaking authority under another Act of Congress and affirmatively *requires* that petitions for reconsideration render the orders under reconsideration nonfinal under every statutory scheme.[29] Nothing in the text of 5 U.S.C. 704 suggests that extraordinary result, which would be inconsistent with this Court's recognition that the Executive officer charged with administering an Act of Congress—specifically including the INA—has the authority to determine what constitutes a "final" decision for purposes of judicial review. See pages 19-20, *supra,* discussing *Weinberger* v. *Salfi,* 422 U.S. at 466; *Cheng Fan Kwok* v. *INS,* 392 U.S. at 216-217 & n.17; and *Foti* v. *INS,* 375 U.S. at 229-230 & n.16, 232. To the contrary, the Court acknowledged in *Locomotive Engineers* that 5 U.S.C. 704 on its face indicates that the pendency of a reconsideration motion does *not* render an agency order nonfinal for purposes of triggering the time for seeking judicial review. See 482 U.S. at 284.

Furthermore, this case involves judicial review provisions that are different than those at issue in *Locomotive Engineers.* There, the Court was concerned with provisions of the statute governing review of administrative orders of the ICC, 49 U.S.C. 10327(i), and the filing period under the Hobbs Act itself, 28 U.S.C. 2344, which expressly governs judicial review of such ICC orders (see 28 U.S.C. 2342(5)).

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[29] In *Locomotive Engineers,* the ICC took the position, in light of consistent agency practice under its statutory and regulatory scheme, that the filing of a petition for reconsideration did render the particular order at issue nonfinal and therefore did stay the running of the 60-day limitations period under the Hobbs Act. See 85-792 and 85-793 ICC & U.S. Supp. Br. at 4-8. The Court therefore did not have occasion to consider the validity of an administrative implementation of the ICC statute (or any other statute) under which a motion to reconsider does not undo the finality of the earlier order.

Although Section 1105a generally incorporates by reference into the INA the judicial review provisions of the Hobbs Act, it specifically departs from the Hobbs Act in a number of respects in order to tailor judicial review to the special context of deportation. And Congress did not just change the number of days listed in the Hobbs Act, it rephrased the entire provision. In lieu of the Hobbs Act language providing that a party "aggrieved by the final order may, within 60 days after its entry, file a petition to review the order" (28 U.S.C. 2344), Congress drafted the INA provision to direct that a petition "may be filed *not later than* 90 days after" the "issuance of the final deportation order." 8 U.S.C. 1105a(a)(1) (Supp. IV 1992) (emphasis added). By virtue of the "not later than" language in Section 1105a(a)(1), it may be read to resemble more a "period of repose," imposing an unequivocal outside limit or cut-off for filing, than a typical limitations period. See *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson,* 501 U.S. 350, 363 (1991). Tolling principles are inconsistent with periods of repose where the primary interest is in achieving closure. *Ibid.* We do not suggest that a phrase such as "not later than" must always be construed to preclude application of tolling principles. But here, when read together with the structure of 8 U.S.C. 1105a as a whole and against the background of Congress's manifest purpose in enacting and amending Section 1105a, the language Congress employed in departing from the Hobbs Act supports the validity of the Attorney General's approach to the finality issue under the INA.

Moreover, in this case, the statute uses a term of art—"final deportation order"—that has been given specific content in implementing regulations (8 C.F.R. 243.1) that were intended specifically to "show when" this particular type of order "becomes final" (26 Fed. Reg. 12,111 (1961)), that were promulgated within months of the

enactment of the statutory provision that establishes the finality of the order as a prerequisite to judicial review, and that have remained in effect, unaltered, throughout the subsequent 33 years. Furthermore, the provision for reopening or reconsideration of a final deportation order derives entirely from regulations of the Attorney General, unlike in *Locomotive Engineers,* where the ICC statute itself provided for petitions to reopen or reconsider (see 482 U.S. at 277-278, citing 49 U.S.C. 10327(g)), and thus lent some force to the ICC's practice of not regarding an order as final for purposes of judicial review until such a petition was disposed of.

This case also differs from the three decisions cited by the Court in the portion of *Locomotive Engineers* on which petitioner relies. In the first of the three cases cited by the Court, the ICC had reopened the administrative record in a case after some of the parties had filed suit in federal court. *American Farm Lines* v. *Black Ball Freight Service,* 397 U.S. 532 (1970). Although the *American Farm Lines* opinion did include the dictum on which the *Locomotive Engineers* opinion relied—stating that "[u]nless Congress provides otherwise," there is no final action until a motion for rehearing is denied, 397 U.S. at 541—the Court clearly recognized that contemporaneous administrative and judicial proceedings do not necessarily collide and are not always precluded, as petitioner's approach suggests. Moreover, here, as we have explained, Congress and the Attorney General have "provide[d] otherwise" in the statutory and regulatory framework of the INA.

In *CAB* v. *Delta Air Lines, Inc.,* 367 U.S. 316 (1961), the Court stated, likewise in dictum, only that there is a "general notion" that administrative orders are not final for purposes of judicial review until outstanding petitions for reconsideration are disposed of, and it referred to the general provisions of the APA concerning finality. See

367 U.S. at 326-327. Moreover, elsewhere in the *CAB* opinion, the Court specifically noted that review of the statutes enacted by Congress to address the various administrative agencies "reveal[ed] a wide variety of detailed provisions concerning reconsideration, *each one enacted in an attempt to tailor the agency's discretion to the particular problems in the area.*" *Id.* at 322 (emphasis added). In the third case cited in *Locomotive Engineers*—*i.e., Outland* v. *CAB,* 284 F.2d 224, 227 (D.C. Cir. 1960)—the agency concerned took the position that the order should be regarded as having been rendered nonfinal under the judicial review statute at issue there by the filing of a petition for rehearing, and the court concluded the "[p]ractical considerations" supported the result it reached. As discussed above, examination of how Congress crafted the INA, in an attempt to tailor judicial review differently for purposes of final deportation orders and the particular problems associated with delay in deportation proceedings, demonstrates the validity of the Attorney General's conclusion that an alien's filing of a motion with the Board to reopen or reconsider a final deportation order does not render the order nonfinal.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

BETH S. BRINKMANN
Assistant to the Solicitor General

LISA DORNELL
Attorney

SEPTEMBER 1994

APPENDIX

8 U.S.C. 1103 (1988 & Supp. IV 1992) provides in pertinent part:

Powers and duties

(a) Attorney General

The Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however,* That determination and ruling by the Attorney General with respect to all questions of law shall be controlling. He shall have control, direction, and supervision of all employees and of all the files and records of the Service. He shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter. He may require or authorize any employee of the Service or the Department of Justice to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon any other employee of the Service. He shall have the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens and shall, in his discretion, appoint for that purpose such number of employees of the Service as to him shall appear necessary and proper. He is authorized to confer or impose upon any employee of the United States, with the consent of the head of the Department or

other independent establishment under whose jurisdiction the employee is serving, any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon officers or employees of the Service. He may, with the concurrence of the Secretary of State, establish offices of the Service in foreign countries; and, after consultation with the Secretary of State, he may, whenever in his judgment such action may be necessary to accomplish the purposes of this chapter, detail employees of the Service for duty in foreign countries.

(b) Commissioner; appointment

The Commissioner shall be a citizen of the United States and shall be appointed by the President, by and with the advice and consent of the Senate. He shall be charged with any and all responsibilities and authority in the administration of the Service and of this chapter which are conferred upon the Attorney General as may be delegated to him by the Attorney General or which may be prescribed by the Attorney General.

* * * * *

8 U.S.C. 1105a (1988 & Supp. IV 1992) provides:

Judicial review of orders of deportation and exclusion

(a) Exclusiveness of procedure

The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or comparable provisions of any prior Act, except that—

(1) Time for filing petition

a petition for review may be filed not later than 90 days after the date of the issuance of the final deportation order, or, in the case of an alien convicted of an aggravated felony, not later than 30 days after the issuance of such order;

(2) Venue

the venue of any petition for review under this section shall be in the judicial circuit in which the administrative proceedings before a special inquiry officer were conducted in whole or in part, or in the judicial circuit wherein is the residence, as defined in this chapter, of the petitioner, but not in more than one circuit;

(3) Respondent; service of petition; stay of deportation

the action shall be brought against the Immigration and Naturalization Service, as respondent. Service of the petition to review shall be made upon the Attorney General of the United States and upon the official of the Immigration and Naturalization Service in charge of the Service district in which the office of the clerk of the court is located. The service of the petition for review upon such official of the Service shall stay the deportation of the alien pending determination of the petition by the court, unless the court otherwise directs or unless the alien is convicted of an aggravated felony, in which case the Service shall not stay the deportation of the alien pending determination of the petition of the court unless the court otherwise directs;

(4) Determination upon administrative record

except as provided in clause (B) of paragraph (5) of this subsection, the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive;

(5) Claim of nationality; determination or transfer to district court for hearing de novo

whenever any petitioner, who seeks review of an order under this section, claims to be a national of the United States and makes a showing that his claim is not frivolous, the court shall (A) pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or (B) where a genuine issue of material fact as to the petitioner's nationality is presented, transfer the proceedings to a United States district court for the district where the petitioner has his residence for hearing de novo of the nationality claim and determination as if such proceedings were originally initiated in the district court under the provisions of section 2201 of title 28. Any such petitioner shall not be entitled to have such issue determined under section 1503(a) of this title or otherwise;

(6) Consolidation

whenever a petitioner seeks review of an order under this section, any review sought with respect to a motion to reopen or reconsider such an order shall be consolidated with the review of the order;

(7) Challenge of validity of deportation order in criminal proceeding; motion for judicial review before trial; hearing de novo on nationality claim; determination of motion; dismissal of indictment upon invalidity of order; appeal

If the validity of a deportation order has not been judicially determined, its validity may be challenged in a criminal proceeding against the alien for violation of subsection (d) or (e) of section 1252 of this title only by separate motion for judicial review before trial. Such motion shall be determined by the court without a jury and before the trial of the general issue. Whenever a claim to United States nationality is made in such motion, and in the opinion of the court, a genuine issue of material fact as to the alien's nationality is presented, the court shall accord him a hearing de novo on the nationality claim and determine that issue as if proceedings had been initiated under the provisions of section 2201 of title 28. Any such alien shall not be entitled to have such issue determined under section 1503(a) of this title or otherwise. If no such hearing de novo as to nationality is conducted, the determination shall be made solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial and probative evidence on the record considered as a whole, shall be conclusive. If the deportation order is held invalid, the court shall dismiss the indictment and the United States shall have the right to appeal to the court of appeals within thirty days. The procedure on such appeals shall be as provided in the Federal rules of criminal procedure. No petition for review under this section may be filed by any alien during the pendency of a criminal proceeding against such alien for violation of subsection (d) or (e) of section 1252 of this title;

(8) Deferment of deportation; compliance of alien with other provisions of law; detention or taking into custody of alien

nothing in this section shall be construed to require the Attorney General to defer deportation of an alien after the issuance of a deportation order because of the right of judicial review of the order granted by this section, or to relieve any alien from compliance with subsections (d) and (e) of section 1252 of this title. Nothing contained in this section shall be construed to preclude the Attorney General from detaining or continuing to detain an alien or from taking him into custody pursuant to subsection (c) of section 1252 of this title at any time after the issuance of a deportation order;

(9) Typewritten record and briefs

it shall not be necessary to print the record or any part thereof, or the briefs, and the court shall review the proceedings on a typewritten record and on typewritten briefs; and

(10) Habeas corpus

any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

(b) Limitation of certain aliens to habeas corpus proceedings

Notwithstanding the provisions of any other law, any alien against whom a final order of exclusion has been made heretofore or hereafter under the provisions of section 1226 of this title or comparable provisions of any prior Act may obtain judicial review of such order by habeas corpus proceedings and not otherwise.

(c) Exhaustion of administrative remedies or departure from United States; disclosure of prior judicial proceedings

An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order. Every petition for review or for habeas corpus shall state whether the validity of the order has been upheld in any prior judicial proceeding, and, if so, the nature and date thereof, and the court in which such proceeding took place. No petition for review or for habeas corpus shall be entertained if the validity of the order has been previously determined in any civil or criminal proceeding, unless the petition presents grounds which the court finds could not have been presented in such prior proceeding, or the court finds that the remedy provided by such prior proceeding was inadequate or ineffective to test the validity of the order.

* * * * *

8 C.F.R. 3.2 provides:

Reopening or reconsideration.

The Board may on its own motion reopen or reconsider any case in which it has rendered a decision. Reopening or reconsideration of any case in which a decision has been made by the Board, whether requested by the Commissioner or any other duly authorized officer of the Service, or by the party affected by the decision, shall be only upon written motion to the Board. Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered

or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him and an opportunity to apply therefor was afforded him at the former hearing unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing. A motion to reopen or a motion to reconsider shall not be made by or in behalf of a person who is the subject of deportation proceedings subsequent to his departure from the United States. Any departure from the United States of a person who is the subject of deportation proceedings occurring after the making of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion. For the purposes of this section, any final decision made by the Commissioner prior to the effective date of the Act with respect to any case within the classes of cases enumerated in § 3.1(b)(1), (2), (3), (4), or (5) shall be regarded as a decision of the Board.

* * * * *

8 C.F.R. 3.6 provides in pertinent part:

Stay of execution of decision.

(a) Except as provided in § 242.2 of this chapter and paragraph (b) of this section, the decision in any proceeding under this chapter from which an appeal to the Board may be taken shall not be executed during the time allowed for the filing of an appeal unless a waiver of the right to appeal is filed, nor shall such decision be executed while an appeal is pending or while a case is before the Board by way of certification.

(b) The provisions of paragraph (a) of this section shall not apply to an order of a Immigration Judge under

§ 242.22 of this chapter denying a motion to reopen or reconsider or to stay deportation, except when a stay pending appeal has been granted by the Immigration Judge. The Board may, in its discretion, stay deportation while an appeal is pending from any such order if no stay has been granted by the Immigration Judge.

* * * * *

8 C.F.R. 3.8 provides in pertinent part:

Motion to reopen or motion to reconsider.

(a) *Form.* Motions to reopen and motions to reconsider shall be submitted in triplicate. A request for oral argument, if desired, shall be incorporated in the motion. The Board in its discretion may grant or deny oral argument. Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material. Motions to reconsider shall state the reasons upon which the motion is based and shall be supported by such precedent decisions as are pertinent. In any case in which a deportation order is in effect, there shall be included in the motion to reopen or reconsider such order a statement by or on behalf of the moving party declaring whether the subject of the deportation order is also the subject of any pending criminal proceeding under section 242(e) of the Act, and, if so, the current status of that proceeding. If the motion to reopen or reconsider is for the purpose of seeking discretionary relief, there shall be included in the motion a statement by or on behalf of the moving party declaring whether the alien for whose relief the motion is filed is subject to any pending criminal prosecution and, if so, the nature and current status of that prosecution. Motions to reopen or reconsider shall state whether the validity of the deportation order has been or is the subject of any judicial proceeding and, if so, the nature and date thereof, the court

in which such proceeding took place or is pending, and its result or status. The filing of a motion to reopen or a motion to reconsider shall not serve to stay the execution of any decision made in the case. Execution of such decision shall proceed unless a stay of execution is specifically granted by the Board or the officer of the Service having administrative jurisdiction over the case.

* * * * *

8 C.F.R. 243.1 provides:

Final order of deportation.

Except as otherwise required by section 242(c) of the Act for the specific purposes of that section, an order of deportation, including an alternate order of deportation coupled with an order of voluntary departure, made by the special inquiry officer in proceedings under part 242 of this chapter shall become final upon dismissal of an appeal by the Board of Immigration Appeals, upon waiver of appeal, or upon expiration of the time allotted for an appeal when no appeal is taken; or, if such an order is issued by the Board or approved by the Board upon certification, it shall be final as of the date of the Board's decision.

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No. 93-1199

In the Supreme Court of the United States

OCTOBER TERM, 1994

MARVIN STONE, PETITIONER

v.

IMMIGRATION & NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF ON THE MERITS

DAVID ERIC FUNKE
Kortz & Funke
Attorney for Petitioner
212 Elm Avenue
P.O. Box 296
Pewee Valley, KY 40056
(502) 241-8221

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ARGUMENT

A. The Attorney General's Definition Of "Final Order Of Deportation" Is Not Dispositive

The Immigration & Naturalization Service ("INS") has invoked the decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) to oppose circuit court jurisdiction of a petition filed within the statutory period after action on a motion to reopen. (Br. 18)

Deference to the Attorney General's definition of final, for the purpose of judicial review, is not warranted when there is a pending motion to reopen or reconsider. Congress has not defined when a deportation order is final. Congress also has not expressed its opinion on the issue of tolling the time period for judicial

review of deportation orders, although there have been several revisions of the Immigration and Nationality Act ("INA") in the 29 years that tolling has been part of our jurisprudence in the judicial review of deportation proceedings. Thus, it is the province of this Court to state what the law is.

Although the Attorney General has defined "final order of deportation" for her purposes, that does not require this Court to defer to it for the purpose of federal jurisdiction.

As the INS noted, the introduction to this regulation at 26 Fed. Reg. 12,113 (1961) explains that the definition of "final order of deportation" at 8 C.F.R. 243.1 "is new." (Br. 15) It appears that there was no notice and comment period for

this particular regulation.[1] Thus, it may be accorded less deference.[2]

Our Courts do have some interest in when matters will come before them from an agency, particularly when the agency is attempting to define or expand jurisdiction. "The fact that construction of the statutory term directly impacts such jurisdictional determinations should, in our view, be factored into a proper analysis of the statutory issue we face." *American Civil Liberties Union v. F.C.C.*, 823 F.2d 1554, 1567 (1987). "[A]n agency ruling that broadens its own jurisdiction

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[1] The relevant introduction in the December 19, 1961 Federal Register does refer to a notice of proposed rulemaking, regarding the INA, at 26 Fed. Reg. 9858 (October 20, 1961), where a 20 day comment period was given. However, those proposed regulations did not contain an equivalent to sec. 243.1.

[2] Indeed, the regulations themselves have never expressly dictated when a petition for review should be filed.

is examined carefully." *Hi-Craft Clothing Co. v. N.L.R.B.*, 660 F.2d 910 (CA3 1981) In this case, the agency is attempting to restrict the Court's ability to review very significant decisions that have been fully developed through administrative reconsideration or reopening. In the course of doing so, the agency may also be increasing the number of filings in circuit court, or prolonging actions in those courts. (Pet. Br. 22-25, 41) This too, gives this Court reason to reject deference.

The filing of a motion to reopen or reconsider does deprive a BIA order of some aspects of finality in all instances, and will deprive a BIA order of all aspects of finality in some instances. A final ruling should end litigation on the merits. *FirstTier Mortgage Co. v. Investors*

Mortgage Ins. Co., 498 U.S. 269, 273 (1991). The mere filing of a motion to reopen or reconsider prolongs litigation on the merits. It means that the BIA opinion and order is in jeopardy, and thus not a "definitive position" referred to in *Darby v. Cisneros*, 113 S. Ct. 2359, 2543 (1993).[3]

While the Attorney General has defined "final order of deportation," "[a]n agency's determination of finality is not necessarily decisive." *Carter/Mondale Presidential Committee v. F.E.C.*, 711 F.2d 279, 288 (1983). However, a "realistic assessment of the nature and effect of the

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[3] "Petitions to reopen, like motions for rehearing or reconsideration, are, as the Immigration Service urged in Foti, 'intimately and immediately associated' with the final orders they seek to challenge." Cheng Fan Kwok v. Immigration Service, 392 U.S. 206, 217, citing brief for Respondent, No. 28, October term 1963, at 53.

order" is relevant. *Fidelity Television v. F.C.C.*, 502 F.2d 443, 448 (1974).

One "effect" of a BIA order is that the INS may execute deportation "no sooner than 72 hours after service of the decision." 8 C.F.R. 243.3(b). The INS points to the longstanding regulation that allows deportation upon BIA order, despite a pending motion to reopen. (Br. 15) While there is no *automatic* stay of deportation, the BIA is indeed empowered to grant a stay. 8 CFR 3.8(a) The INS may also grant a stay, 8 C.F.R. 243.4, and it is INS policy that, when a motion to reopen is filed, "a brief memorandum *shall* be prepared by the district director indicating whether deportation will be stayed while the motion is being considered by the Board ...." [emphasis added] Immigration & Naturalization Service Operations Instruction 3.1 (g).

The decision in *Weinberger v. Salfi*, 422 U.S. 749, 766, (1975), should not compel deference for the purpose of circuit court jurisdiction. (Br. 19, 34) In *Salfi*, the Court was concerned with whether the litigants had reached a "final decision" enabling judicial review. Again, the Court held that exhaustion of the *full range* of administrative remedies was not *required* to reach the threshold for judicial review. Since the term "final decision" was not defined by Congress in Title 42, the Court could defer the agency's determination "*in particular cases* that full exhaustion of internal review procedures is not necessary." 422 U.S. at 767. (emphasis added)[4]

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[4] The exhaustion requirement was not challenged by the parties in *Weinberger v. Salfi*, 422 U.S. at 767. The Court had noted that "on their face" the steps taken by the parties had "fall[en] short of meeting" the statutory and regulatory specifications for

This Court has referred to a "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987). To prevent a non-citizen from electing completion of a motion to reopen before seeking judicial review would be arbitrary, capricious, and, as noted below, contrary to the Immigration & Nationality Act.

B. The Text, Structure, And Background Of The INA Shows That Tolling The Time Period For Judicial Review Is Favored By The INA.

1. *The 1961 Enactment of 8 U.S.C. 1105a*

The INS points to the difference in statutory language regarding the deadline for filing a petition for review between 8

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finality. *Id.* at 765.

U.S.C. 1105a ("INA 106(a)") and the Hobbs Act (Br. 23-24, 35). The Hobbs Act, at 28 U.S.C. 2344, states that a party "may, within 60 days after its entry, file a petition to review the order in the court of appeals." The "may" language in the Hobbs Act is not so "permissive" as to relieve parties of the 60 day requirement. *Microwave Communications, Inc. v. FCC*, 515 F.2d 385. The "may" language simply means such a motion is not necessary for exhaustion of administrative remedies. Thus, it cannot be inferred that INA 106(a) is designed to be more strict than the Hobbs Act.

The Court below, as well as the INS, points to the Act of September 26, 1961, Pub. L. No. 87-301, for support. *Stone v. INS*, 13 F.3d at 936-37 (Br. 22-24) However, this Court noted on several

occasions that the legislation was designed to limit repetitive or prolonged judicial review. This is distinct from prolonged administrative action, or delayed judicial review. "The fundamental purpose of section 106 (a) was to abbreviate the *process of judicial review* of deportation orders in order to frustrate ... dilatory tactics ...." *Foti v. Immigration Service*, 375 U.S. 217, 287 (1963) [emphasis added] The Court cited the House report which was disturbed with the "frequency of *judicial actions* being instituted by undesirable aliens ..." Ibid. [emphasis added][5]

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[5] H.R. Rep. No. 1086, 87th Cong, 1st Sess. 22-23 (1961), *reprinted in* 1961 U.S. Code Cong. & Ad. News 2967. The report states that the new exhaustion of administrative remedies requirement was added in order to "curtail, if not eliminate repetitious and unjustified appeals to courts." *Id.* at 2971. Nonetheless, the report shows that Congress wants aliens to have access to the Courts "[s]ince deportation proceedings deal with the liberty of persons rather than mere

Petitioner maintains that the approach of the 9th, 11th, 5th, and D.C. circuits --- those that allow tolling --- is a framework for less activity in the Circuit Courts. (Pet. Br. 22-25) Indeed, this Court found a Ninth Circuit interpretation of INA 106(a) "persuasive" in *Cheng Fan Kwok v. Immigration Service*, 392 U.S. 206, 215 (1968) (Harlan, J), citing *Yamada v. Immigration & Naturalization Service*, 384 F.2d 214, 218. "Congress visualized a *single* administrative proceeding in which all questions relating to an alien's deportation would be raised and resolved, followed by a *single* petition in a court of appeals for judicial review ...." *Ibid.* [emphasis added] Nearly twenty years later, the Ninth Circuit reaffirmed its belief that the "tolling of the limitations

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property ...." *Id.* at 2973.

period can be explained in terms of the congressional purpose underlying section 106 ..." because it actually limits the ability of an alien to return to federal court for successive reviews, and keeps the judicial review process "unitary." *Hyun Joon Chung v. INS*, 720 F.2d 1471, 1474 (CA9 1983), *cert denied*, 467 U.S. 1216 (1984).

2. *The 1990 Amendments*

a. The circuits and the parties involved here disagree as to the meaning of the new paragraph (6) of INA 106(a), which states that "whenever a petitioner seeks review of an order under this section, any review sought with respect to a motion to reopen or reconsider such an order shall be consolidated with the review of the order." 8 U.S.C. 1105a(a)(6) (Supp. IV 1992). Petitioner respectfully disagrees with the INS's belief that this amendment

presupposes separately filed review petitions. (Br. 27) The second sentence of the amendment refers to the *seeking* of judicial review regarding a motion to reopen and reconsider, not the filing of a separate petition. The analysis given by the Court below is not helpful or persuasive. *Stone v. INS*, 13 F.3d at 938, Pet. App. A8. (Br. 27) The amendment requires the consolidation of *reviews*, which does not necessitate the filing of separate or distinct *petitions*. When an alien's motion to reopen is decided, one petition would be filed consolidating two reviews, the review of the original BIA order and the BIA action regarding the motion. [6] This interpretation is consistent

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[6] The eighth circuit holds that 8 U.S.C. 1105a(a)(6) supports neither the Petitioner's position nor the Respondent's view. *White v. INS*, 6 F.3d 1312, 1317 (CA8 1993) *cert denied*, ___ U.S. ___, No. 93-1411. The Solicitor General opposed

with the 1961 legislative background of section 106, which was concerned with multiple petitions in federal court.

b. The 1990 amendments contained legislative directives that the Attorney General should 1) limit the time period for filing motions to reopen and reconsider reconsider; 2) limit the number of such motions. Immigration Act of 1990, Pub. L. No. 101-649, sec. 545(d), 104 Stat. 5066. The time limits for filing judicial review petitions were also shortened. However, these developments strengthen the position of the Petitioner and the agreeing circuits. These proposed limits will nullify fears of an endless cycle of motions and reviews. They also will shorten any time gaps between a BIA deportation

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granting certiorari in *White*.

order and judicial review. [7]

C. The Court's Decision in *ICC v. Brotherhood of Locomotive Engineer's* is Consistent With Petitioner's View

As the INS points out, the statutes involved in *Locomotive Engineers* do not prevent petitions for reconsideration from rendering the underlying order nonfinal. (Br. 32-33) Also, a final ICC order is enforceable, notwithstanding the ICC's ability to reopen or reconsider that order.

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[7] The INS stated that the Attorney General's Report to Congress on Consolidation of Requests for Relief From Deportation is not germane to the issue of the time limit for judicial review. (Br. 30, n. 26) The Petitioner maintains that it is helpful to the Court. The Report acknowledges the disincentives to abusive conduct which are relevant to administrative litigation in general. The Report, for example, states that "the stringent requirements of 8 C.F.R. 3.2 and 3.8 (*relating to the BIA*)" largely eliminate abuses. (emphasis added) (Pet. Br. A11E-3)

49 U.S.C. 10327(i). Similarly, a deportation order is enforceable, notwithstanding the alien's or the Attorney General's ability to have it reconsidered.[8]

The INS points to some statutory differences between the INA and the Hobbs Act, as well as policy or "practical considerations," that require *Stone* to be distinguished from *Locomotive Engineers*. (Br. 35, 37). These issues have been treated in sections "A," and "B," and in Petitioner's brief. While the Attorney General may define "final," that definition is not undermined by permitting a non-citizen to complete a motion to reopen or

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[8] Two circuits have held that *Locomotive Engineers* does not control. *White v. INS*, 6 F.3d at 1314-1317; *Alleyne v. INS*, 879 F.2d at 1180-1182 & n.7. The courts did so, mostly, out of fears of abusive appeals. These concerns have been dealt with in this brief and the brief on the merits.

reconsider before petitioning for judicial review. Indeed, the interests of justice favor the approach that has been followed for nearly 30 years in our most alien populated circuit, and our other border circuits.

Respectfully submitted.

David E. Funke

Attorney for Petitioner